90-1858

FILED
FEB 27 1991
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

MICHAEL SWEPSTON, PAM PADLEY, BARBARA SIECK, and BENITA LEVINGSTON,

Petitioners,

vs.

CLARK DAVENPORT SNELL, SHARON RUTH SNELL, JIM R. SNELL, BETH SNELL, JASON SNELL, BRITTANY SNELL, PATRICIA JEAN TURTLE, and JESSE SANDERS,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Barbara Sieck, and
Benita Levingston

QUESTIONS PRESENTED FOR REVIEW

The Tenth Circuit Court of Appeals has determined that state social workers seeking a pre-petition protective custody order from a juvenile court and alleged to have assisted or acquiesced in the use of information known to be false in securing that order are not entitled to absolute immunity. The court, in addition, determined that an attorney employed by a state child protective services agency, while functioning as a prosecutor in filing an application with a juvenile court was not entitled to absolute immunity. The questions presented are:

1. Whether state social workers seeking pre-petition protective orders from a juvenile court are entitled to absolute immunity?

2. Whether an attorney employed by a state child protective services agency is

entitled to absolute immunity when filing an application with a juvenile court at the request of the juvenile court?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW..... i

TABLE OF AUTHORITIES.....iv

OPINIONS DELIVERED IN COURTS BELOW.....1

JURISDICTION OF THIS COURT.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS.....1

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....23

CONCLUSION.....30

TABLE OF AUTHORITIES

CASES

Austin v. Borel, 830 F.2d 1356 (5th Cir. 1987)..... 24

Coverdell v. Department of Social & Health Service, 834 F.2d 758 (9th Cir. 1987) 26

Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).....27

McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L.Ed.2d 647 (1971).....29

Mitchell vs. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985).....3

Myers v. Contra Costa County Department of Social Service, 812 F.2d 1154 (9th Cir.), cert. denied, 484 U.S. 829,108 S. Ct. 98, 98 L.Ed.2d 59 (1987).....25

Snell v. Tunnell, 698 F.Supp. 1542 (W.D. Okla. 1988).....1

Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990).....1, 24, 28, 29

Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L.Ed.2d 331 (1978).....27, 28

Vosburg v. Department of Social Services, 884 F.2d 133 (4th Cir. 1989).....26, 27

STATUTES

Federal

28 U.S.C. §§1131 and 1343.....3

28 U.S.C. §1254(1).....1

28 U.S.C. §1291.....3

42 U.S.C. Section 1983.....2, 4

42 U.S.C., §1985.....7

State

21 O.S. 1987 Supp. §§845, 846.....8

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion delivered in this case by the United States District Court for the Western District of Oklahoma is printed in the Appendix and is reported at 698 F.Supp. 1542. The opinion delivered by the Tenth Circuit Court of Appeals is printed in the Appendix and is reported at 920 F.2d 673.

JURISDICTION OF THIS COURT

The judgement of the Tenth Circuit Court of Appeals was entered on November 30, 1990, affirming the judgment of the United States District Court for the Western District of Oklahoma entered on November 2, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

21 Oklahoma Statutes, 1987 Supplement, §§845, 846 are set forth in Appendix 3.

10 Oklahoma Statutes, 1987 Supplement, §§1104.1 and 1107, are set forth in Appendix 4.

STATEMENT OF THE CASE

On September ?, 1987 Respondents commenced this civil rights action in the United States District Court for the Western District of Oklahoma to recover actual and punitive damages and to obtain injunctive relief for alleged violations of their constitutional rights arising out of child abuse and child care facility licensing investigations and related juvenile court proceedings in Oklahoma City, Oklahoma. The district court had jurisdiction pursuant to 28 U.S.C. §§1131 and 1343. Upon the subsequent appeal from the decision of the district court, the Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291; Mitchell vs. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

Named as defendants in the original complaint were the Department of Human Services ("DHS") of the State of Oklahoma

and the following officials and employees of DHS: Conley Tunnell, Assistant Director, DHS, Division of Children and Youth Services ("DCYS"); Lissa Vernon, Supervisor of Child Welfare Field Services, DCYS; Mary Asbury, District Supervisor, Child Welfare Field Services, DCYS; Mike Swepston, County Supervisor, Oklahoma County Child Welfare Field Services, DCYS; Barbara Sieck, a supervisor in DHS's Oklahoma County Child Welfare Unit; Benita Levingston, a social worker in DHS's Oklahoma County Child Welfare Unit; and Pam Padley, an Assistant General Counsel in DHS's Legal Division. Also named as a defendant was the Honorable Sidney D. Brown, Presiding Juvenile Judge of the Oklahoma County District Court.

The original Complaint set out a series of alleged actions claimed to violate 42 U.S.C. §1983 (Count I), 42 U.S.C. §1985 (Count II), the Fourth, Fifth and Fourteenth

Amendments to the United States Constitution (Counts II through VII), the plaintiffs' "right to privacy in their home and the integrity of their family as protected by the United States Constitution" (Count VIII), and the Supremacy Clause (Count IX).

The plaintiffs identified in the original complaint were Clark Snell, Sharon Snell, and Jim Snell; three minor children of Clark and Sharon Snell - Beth Snell, Jason Snell, and Brittany Snell; eight children for whom Clark and Sharon Snell claimed to be legal guardians - Patricia Turtle, Melissa Hammett, Jesse Sanders, Terry Hayes, Charles Rock, Travis Rock, Charles Ford, and Barbie Ford; and seven children for whom Clark and Sharon Snell claimed to be "legal custodians" - Dominique Boone, Michael Boone, Shannon Scruggs, Arriba Jackson, Tesara Jackson, Megan Barnes, and Aqueeleh Mayberry.

On February 16, 1988 the district court appointed Ted Sherwood to serve as guardian ad litem for the fifteen children identified in the complaint as under the legal guardianship or custody of Clark and Sharon Snell. On October 13, 1988 the district court entered an order discharging Mr. Sherwood as guardian ad litem for Patricia Turtle and Jesse Sanders and allowing representation of those plaintiffs by counsel for Clark and Sharon Snell. Settlement was reached between defendants and the remaining thirteen children represented by Mr. Sherwood. As a result, the only remaining plaintiffs in the case are Clark Snell, Sharon Snell, Jim Snell, Beth Snell, Jason Snell, Brittany Snell, Patricia Turtle, and Jesse Sanders.

On October 23, 1987 a motion to dismiss was filed on behalf of DHS and its employees and a separate motion to dismiss was filed

on behalf of Judge Brown. The district court granted Judge Brown's motion and dismissed Count IX of the Complaint, but otherwise denied the motion to dismiss filed on behalf of DHS and its employees.

On February 4, 1988 plaintiffs filed an amended complaint. The only substantive amendment of the original complaint was the addition to Count VIII of an allegation of "injury to reputation". The defendants filed their Answer on February 16, 1988, asserting both absolute and qualified immunity as affirmative defenses. On September 20, 1988 Vernon was dismissed from the case by stipulation of the parties. On that date, the plaintiffs also dismissed their claims made under 42 U.S.C., §1985.

On July 6, 1988 defendants filed a Motion for Summary Judgment, asserting both absolute and qualified immunity. The district court entered an order granting

summary judgment in favor of both Tunnell and DHS. On October 28, 1988 the district court issued an order granting summary judgment in favor of Asbury, denying summary judgment to Padley, Swepston, Sieck and Levingston as to plaintiffs' Fourth Amendment claim and conspiracy claim, but otherwise granting summary judgment to defendants on plaintiffs' remaining claims. On November 2, 1988 the court issued a corrected order. The Petitioners appealed from the district court's denial of absolute and qualified immunity and the Court of Appeals entered its Order affirming the district court's decision on November 30, 1990.

The Department of Human Services is an agency of the State of Oklahoma and its statutory responsibilities include the investigation of any report of child abuse or neglect, 21 O.S. 1987 Supp. §§845, 846.

On or about August 4, 1987, Asbury received three reports relating to the Snell house. The first report alleged that from seventeen (17) to more than twenty (20) children resided at the Snell house with inadequate supervision. The second report indicated that an eleven-year-old child who had recently resided at the Snell house alleged that he had been threatened by Mr. Snell; that he had been kicked and struck by Mr. Snell; and that two children were made to sleep on the floor because they had wet their beds. The third report asserted that children at the Snell house were unsupervised and lacked adequate care.

On August 10, 1987 Asbury gave these reports to Sieck for assignment to a worker. At that time Asbury directed Sieck to delay action on the reports until she received further direction. On August 12, 1987 Asbury met with Vernon; Prins Anderson,

Programs Administrator, DHS Licensing Unit; and Padley to discuss the manner in which to proceed with the investigation of the reports in light of additional information available to DHS regarding the Snells.

In July, 1987 an allegation of neglect at the Snell house was investigated and ruled uncertain due to the Snell's refusal to provide specific information about the number and identities of children in the house. DHS had become aware that Mr. Snell had a criminal record, but that he had certified in adoptive home studies done by DHS and filed in state court that he had no criminal record. DHS had also become aware of a study of the Snell home done in February, 1987 by a private child care agency indicating that, although the Snells were not licensed as required by state law, they appeared to be operating as an emergency shelter and over a period of years

as many as one hundred (100) children had resided at the Snell house. The information in that report concerning the number of children in the Snell home and their legal status, the Snells' income, and Mr. Snell's educational background contradicted information provided by the Snells to the DHS Licensing Unit on April 1, 1987 and to other DHS officials in July, 1987. The Snells had assured DHS licensing officials that all of the children in their home were either natural or adopted children or had been placed in the home by court action.

Complaints had been received indicating that parents may have been coerced into placing their children at the Snell home. The most recent complaint of that nature had been made in the summer of 1987. The mother of one child had alleged that during the summer of 1987 she and her husband were coerced by staff at a local shelter into

signing a document granting temporary custody of her child to the Snells with the threat that if they failed to sign they would lose their child because "welfare" would be called.

At the meeting on August 12, 1987 these matters were discussed by Asbury, Anderson, Vernon and Padley. It was decided at that time that Child Protective Services would seek police assistance in conducting the investigation and that Padley would attempt to contact the district attorney's office.

On or about August 12, 1987 Asbury directed Levingston, the worker to whom the current referrals had been assigned by Sieck, to determine which police department had jurisdiction and to contact the appropriate police department for assistance in conducting the investigation. On or about August 14, 1987, Detective Jay Einhorn of the Oklahoma City Police Department

(OCPD) went to the DHS building at the request of Levingston. Levingston was not present during the discussion that followed. Swepston and Asbury related to Einhorn that they felt there was something possibly going on at the Snells' that would involve the police department because of the large number of children involved, the Snells' refusal to provide a worker with information about the children and the fact that Mr. Snell had filled out documents for DHS stating he had no criminal record. Einhorn had already found Mr. Snell's criminal record.

According to Einhorn, the possibility of child prostitution or child trafficking was discussed between himself, Asbury and Swepston and Einhorn might have been the person who brought up the question. The speculation on child prostitution, child trafficking, or similar offenses took on a

greater meaning for Einhorn and became a serious question in his mind only after his latter contacts with the F.B.I. Einhorn told Swepston and Asbury that a police investigation was warranted and told them not to do anything until they heard further from him.

On or about August 12th, 1987, Asbury discovered that a state statute provided that it is a misdemeanor to have guardianship of more than five (5) unrelated persons. This statute made it clear that previous statements by Mr. Snell regarding legal guardianship could not be true if there were indeed fifteen (15) to twenty (20) children in the house. Levingston, Sieck, and another DHS employee, at the direction of Asbury, contacted the police and Judge Brown concerning the application of this statute to the Snell situation. Padley was ultimately contacted for an

interpretation of the statute and indicated that she did not understand the statute to authorize removal of children.

On August 24, 1987, Asbury met with Levingston. Asbury told Levingston that she was concerned that the police did not appear to be doing anything. On, or just prior to, August 24, 1987, Asbury gave Levingston a licensing statute which contained the language "upon conviction" and told Levingston it was relevant to the Snell case. Levingston asked for and received permission from Swepston and Sieck to talk to Judge Brown and ask him for an interpretation of this statute. Levingston went to Judge Brown's office and asked him for an interpretation of the statute. Judge Brown's interpretation was that the "upon conviction" language did mean that violation of the statute was a misdemeanor and that the parents could be arrested.

Three contacts with the district attorney's office were attempted while the investigation was pending. On or about August 24, 1987 Levingston attempted to consult with Assistant District Attorney Mary (Mimi) Smith for the purpose of interpreting the licensing statute given to Levingston by Asbury; however, no discussion relating in any manner to the Snells ever occurred between Levingston and Smith. Approximately one week prior to August 26, 1987 Padley attempted to discuss the Snell situation with Rebecca McNeese, Assistant District Attorney in charge of juvenile matters. McNeese abruptly ended the conversation, apparently because she was angry about another case that had arisen in child welfare, and permitted no opportunity for a discussion of the Snell situation. McNeese testified that she was told by one of her assistants, Steve Sullins, that he

had been approached by Sieck about picking up 19 or 20 children in a home and had been given a copy of a guardianship statute and a written statement by a woman who had had a child at the Snell. There is no affidavit or deposition testimony from Sullins in the record. Sieck testified that on August 20th she took the guardianship statute to the district attorney's office and explained the problems occurring in trying to investigate the Snell situation and that she was never told by the district attorney's office that the statute could not be a basis for intervention.

On August 26, 1987 between 8:00 and 8:30 a.m. Levingston called Einhorn and told him the interpretation Judge Brown had given the statute. Levingston suggested to Einhorn that he call Judge Brown to make sure Einhorn understood the same thing that Levingston had understood. That morning

Judge Brown received a message from Einhorn requesting the Judge to call and stating "Important, please call back as soon as possible." Upon returning the call Einhorn advised the Judge that the FBI was investigating the Snells because an associate of theirs was involved in interstate pornography and prostitution and that they were concerned about the children's welfare. It was Judge Brown's understanding from Einhorn's representations that the OCPD and the FBI were investigating the Snells along with DHS.

Einhorn asked the court for a pickup order and was to obtain it approximately one hour later. Because of a hearing, however, the Judge did not have the order prepared when Einhorn arrived. The judge therefore directed his bailiff to call Padley and tell her what information Einhorn had given him, and to further instruct Padley to call

Einhorn and "get this information coordinated". Judge Brown would have issued the order based on the oral representations made to him by Einhorn; however, because the Judge was so rushed he wanted it in writing. Indeed, had the Judge been pressed by Einhorn he would have given Einhorn the order. After Einhorn had left Judge Brown's office, Judge Brown called Padley and asked her if she could present an application to the Court.

On August 26, 1987 Einhorn contacted Padley and informed her that he had contacted Judge Brown earlier that morning regarding the Snells and that Judge Brown was going to issue an order to the police; however, when Einhorn had gone to Judge Brown's office, the Judge had indicated he wanted an application from DHS. Einhorn indicated to Padley that he was aware of a police investigation of the Snells regarding

child prostitution and pornography. Relying on the statements of Einhorn, the request by the court, and her previous knowledge of DHS abuse/neglect investigations regarding the Snells as well as the licensing issues involved, Padley prepared and filed the application.

The application recited that DHS had received allegations of neglect, lack of supervision and child pornography in the Snell's home; that DHS had received information that the Snells were operating an unlicensed emergency shelter; that DHS had been unable to complete its investigation due to lack of cooperation by the Snells; and that DHS was concerned regarding the welfare of children residing there. The application requested the court to provide whatever assistance it deemed appropriate.

Prior to filing the application, Padley attempted to contact Asbury, Tunnell and Vernon, but was unsuccessful. Padley testified that the assertion DHS had received allegations of child prostitution and child pornography was based upon the second of two conversations she had with Detective Einhorn on the morning of August 26, 1987. Padley further testified that subsequent to her first conversation with Einhorn she had telephoned some "child welfare people", including Swepston, Levingston, and perhaps Sieck, and discussed the current status of the case and the investigation. There is no evidence that Padley discussed the information she received from Einhorn with Levingston, Sieck or Swepston. No one either encouraged or discouraged her from filing the application or reviewed the application after Padley prepared it for submission to Judge Brown.

Upon presentation of the application, Judge Brown dictated an order to the Oklahoma City Police Department directing that Clark and Sharon Snell cooperate with DHS in investigations regarding child abuse and licensing. The order further provided that access be provided to children living at the Snell house. The order further required that "any police officer or law enforcement agency is hereby directed to execute this Order," and take into custody any child for whom "Clark and Sharon Snell and/or their agents are unable to produce valid Court Orders signed by a Judge" pertaining to the child.

At approximately 3:50 P.M on August 26, 1987, Padley delivered the order to the office area of Levingston whereupon it was reviewed by Levingston, Sieck, Swepston and Padley. Between 5:30 and 6:00 P.M. on August 26th, Sgt. George Johnson of the OCPD, as

well as officers Picchione and Hill, were accompanied by Levingston and Sieck to the Snell home. Upon arriving at the home, Sgt. Johnson examined documents relating to children residing there and with the assistance of the other officers and DHS employees, he was able to identify seven children for whom no court document was produced. Sgt. Johnson determined that, in accordance with the court's order, the seven children for whom no valid court order had been produced would be placed in his custody and removed from the house. The seven children were placed in patrol cars and transported to the Oklahoma County Juvenile Shelter and admitted by the officers to the shelter.

REASONS FOR GRANTING THE WRIT

The Court of Appeals determined that Petitioners are not entitled to absolute immunity in seeking a pre-petition order

from the juvenile court. Petitioners respectfully assert that this decision is in conflict with decisions of other U.S. Courts of Appeal on the same matter and decide a federal question in a way that conflicts with applicable decisions of this Court.

The Tenth Circuit Court of Appeals concluded that Swepston, Sieck and Levingston were not entitled to absolute prosecutorial immunity because "[A] social worker seeking a pre-petition order for protective custody functions like a police officer seeking an arrest warrant; a functional approach to immunity requires that those performing like functions receive like immunity." Snell, 920 F.2d at 690, citing Austin v. Borel, 830 F.2d 1356, 1362 (5th Cir. 1987). In addition, the Court of Appeals found absolute immunity for these Petitioners inappropriate since, viewed in the light most favorable to the plaintiffs,

"the summary judgment evidence indicates that these defendants assisted or acquiesced in the use of information known to be false concerning the Snells ... ". Id. at 691-92. The Court denied absolute immunity to Padley on the ground that although Padley "was functioning as a prosecutor, she did so without color of authority in these circumstances ... ". Id. at 696.

The Ninth Circuit has adopted a rule of absolute immunity for child dependency proceedings from origination until conclusion. In Myers v. Contra Costa County Dep't of Social Serv., 812 F.2d 1154, 1157 (9th Cir.), cert. denied, 484 U.S. 829, 108 S.Ct. 98, 98 L.Ed.2d 59 (1987), the court held that "social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child and dependency proceedings." Relying upon

Myers, the Ninth Circuit has held that a social worker seeking a court order for immediate apprehension of a newborn from her natural mother is entitled to absolute immunity for such quasi-prosecutorial conduct. Coverdell v. Department of Social & Health Serv., 834 F.2d 758, 764 (9th Cir. 1987). In Coverdell, the social worker completed an affidavit used by the prosecutor in obtaining a court order for custody of the child. Id. at 760. Under a theory of quasi-judicial immunity, the court determined that the social worker was entitled to absolute immunity for seeking and obtaining the order. Id. at 764-65.

In Vosburg v. Department of Social Services, 884 F.2d 133 (4th Cir. 1989), the court determined that social workers filing pleadings for temporary custody in advance of a formal petition are entitled to absolute immunity. The court based that

determination in part on the conclusion that "[U]nder Virginia law, the filing of a removal petition, in essence, is the start of judicial proceedings against the parent or guardian of the minor child, and the duties of the social worker at that point are those of an advocate in that process." Id. at 137.

The decisions of this Court concerning absolute immunity establish two points relevant to the instant case. First, absolute immunity of public officials cannot be defeated on the grounds that the officials' conduct was malicious or dishonest. Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 993, 47 L.Ed.2d 128 (1976); Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 1104-05, 55 L.Ed.2d 331 (1978). Second, when the jurisdiction or authority of an officer to act is at issue, absolute immunity is inappropriate only when there is

a complete and clear absence of all jurisdiction. Stump, 435 U.S. at 356-57, 98 S.Ct. at 1104-05.

In the instant case, pre-adjudicatory custody orders issued by the juvenile court are likewise, in essence, the start of a judicial process against the parent or guardian of a minor child. In practice, orders for protective custody frequently precede petitions. Snell, 920 F.2d at 690. The Court of Appeals acknowledged that applicable Oklahoma Statutes did not prescribe any procedure for seeking or securing pre-adjudicatory orders from the juvenile court and that the policies and procedures regarding such orders were established by the presiding judge of the juvenile division of the district court. Snell, 920 F.2d at 695. The Court of Appeals also acknowledged that the presiding judge of the juvenile court requested the

application from DHS and told Padley to prepare the application. Snell, 920 F.2d at 693. Under these circumstances, Padley clearly possessed at least colorable or arguable authority to act.

The Tenth Circuit's treatment of social workers involved in seeking pre-petition orders from the juvenile court conflicts with the Ninth Circuit's and Fourth Circuit's treatment of workers similarly situated. The juvenile court system is quite distinct from the criminal justice system, see McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 1989, 29 L.Ed.2d 647, (1971), and child protective services workers charged with application of intentionally broad statutory language for the protection of children should be distinguished from police officers and afforded the immunity extended in these circumstances by the decisions of the Ninth

and Fourth Circuit Courts of Appeal. Further, the Tenth Circuit's reliance on allegations of fraud in denying absolute immunity conflicts with decisions of this Court. Petitioners respectfully assert that these conflicts justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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90-1353 (3)

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In The

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October Term, 1990

MICHAEL SWEPSTON, PAM PADLEY, BARBARA SIECK, and BENITA LEVINGSTON,

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CLARK DAVENPORT SNELL, SHARON RUTH SNELL, JIM R. SNELL, BETH SNELL, JASON SNELL, BRITTANY SNELL, PATRICIA JEAN TURTLE, and JESSE SANDERS,

Respondents,

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX 1

OPINION
APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT
Filed November 30, 1990

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CLARK DAVENPORT SNELL; SHARON SNELL, individuals, husband and wife; JIM R. SNELL, an individual; BETH SNELL, a minor child by her next friends and parents Clark and Sharon Snell; JASON SNELL, a minor child by his next friends and parents, Clark and Sharon Snell; BRITTANY SNELL, a minor child by her next friends and parents Clark and Sharon Snell; PATRICIA JEAN TURTLE, by her next friends and legal guardians Clark and Sharon Snell; and JESSE SANDERS, by his next friends and legal guardians Clark and Sharon Snell,	)	
Plaintiffs-Appellees	)	
vs.	)	Case No. 88-2879
CONLEY TUNNELL; LISSA VERNON; MARY ASBURY; THE	)	(Filed November 30, 1990)

HONORABLE SIDNEY D. BROWN; and STATE OF OKLAHOMA ex rel. The Department of Human Services,

Defendants,

and

MICHAEL SWEPTSON; BARBARA SIECK; BENITA LEVINGSTON; and PAMELA PADLEY,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-87-1812-P)

David A. Brown, Assistant General Counsel (Charles Lee Waters, General Counsel, Roger Stuart and Richard L. Freeman, Jr. Assistant General Counsel, with him on the brief), Legal Division, Department of Human Services, Oklahoma City, Oklahoma, for Defendants-Appellants.

Marjorie Ramana (Allan DeVore with her on the brief), The DeVore Law Firm, Oklahoma City, Oklahoma, for Plaintiffs-Appellees.

Before SEYMOUR and BALDOCK, Circuit Judges and SAFFELS, District Judge.*

BALDOCK, Circuit Judge.

> We should be careful to get out of an experience only the wisdom that is in it--and stop there; lest we be like the cat that sits down on a hot stove-lid. She will never sit down on a hot stove-lid again--and that is well; but she will never sit down on a cold one any more.
>
> Pudd'nhead Wilson's New Calendar.
>
> I M. Twain, Following the Equator ch. XI at 107 (Harper Bros. ed.).

Plaintiffs instituted this action seeking injunctive relief and damages under

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*The Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

42 U.S.C. §§ 1983 & 1985 based upon an investigation by the Oklahoma Department of Human Services (DHS) concerning allegations of child abuse. The district court denied injunctive relief, the § 1985 claim was dismissed, and only four defendants remain after district court proceedings. In this appeal, we are required to decide whether these remaining defendants, DHS employees, are entitled to absolute or qualified immunity for activities which occurred during an investigation of a shelter/home for children operated by plaintiffs-appellees, Clark and Sharon Snell.

Defendants-appellants, Michael Sweptson (County Supervisor; Oklahoma County Child Welfare Field Services, Division of Children and Youth Services (DCYS)), Barbara Sieck (Social Services Supervisor; Oklahoma County Child Welfare Unit), Benita Levingston

(Social Worker; Oklahoma County Child Welfare Unit), and Pam Padley (Assistant General Counsel; DHS) appeal from the district court's denial of absolute and qualified immunity. We review the denial of immunity de novo as a final decision under 28 U.S.C. § 1291. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); McEvoy v. Shoemaker, 882 F.2d 463, 465 (10th Cir. 1989).

Given the facts, we agree with the district court that the three non-attorney defendants challenging the denial of absolute immunity (Sweptson, Sieck and Levingston) were acting in an investigative, rather than a prosecutorial capacity, and accordingly, we affirm the denial of absolute immunity for these defendants. On narrower grounds, we affirm the district court's decision that the defendant DHS attorney (Padley) is not entitled to

absolute immunity. We determine that defendant Padley, though acting in a prosecutorial capacity, did so without authority when she applied to the district court for assistance with the investigation of the Snells. As to the defense of qualified immunity, we agree with the district court that obtaining a court order, used to gain entry into the Snell home, based upon information known to be false clearly violates the fourth amendment, and a reasonable public official would have known this. Thus, we affirm the denial of qualified immunity for such conduct.

I.

At the outset, we note that our review of the district court's order is limited to deciding whether absolute or qualified immunity was properly denied to these four remaining defendants given the trial court's

decision that the plaintiffs could proceed to trial. Snell v. Tunnell, 698 F. Supp. 1542 (W.D. Okla. 1988). Although the district court resolved other issues in its lengthy opinion, we do not pass on the merits of the issues which encompass the grant of summary judgment in favor of other defendants,[1] including Mary Asbury (District Supervisor; Child Welfare Field Services, DCYS) and Conley Tunnell (Assistant Director; DHS; DCYS). We also do not pass on claims involving the grant of qualified immunity to the defendants.

In their brief, the Snells have challenged the district court's grant of

[1]The district court dismissed Judge Brown as a defendant. Snell, 698 F.Supp. at 1543 n.1. The parties stipulated to the dismissal of defendant Lissa Vernon. Id. at 1544. Summary judgment was granted in favor of defendants Asbury, id. at 1565, and Tunnell, id. at 1544.

qualified immunity to the defendants on the Snells' due process (liberty) and privacy claims. Brief of Plaintiffs-Appellees at 37-39. We have recognized the doctrine of pendent appellate jurisdiction to decide otherwise non-appealable issues, see State of Colo. v. Idarado Mining Co., 916 F.2d 1486, ____-__, (10th Cir. 1990) (1990 WL 150137 at 24-25]; Tri-State Generation & Transmission v. Shoshone River Power, 874 F.2d 1346, 1351-53 (10th Cir. 1989), and have applied the doctrine in cases involving claims of immunity to determine that a plaintiff's substantive claims were barred, see Petrini v. Howard, No. 88-2204, slip op. at 2-3 (10th Cir. Nov. 15, 1990) [1990 WL 176845 at 2]; Hill v. Department of the Air Force, 884 F.2d 1318, 1320 (10th Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990); see also Dube v. State Univ., 900 F.2d 587, 598-

600 (2d Cir. 1990); 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure §3914.20 (1990 Supp.). However, even assuming that our jurisdiction could extend to a plaintiff's cross-appeal from a defendant's interlocutory appeal of a denial of immunity, see Barrett v. United States, 798 F.2d 565, 571 (2d Cir. 1986) (cross appeal of grant of immunity permitted where issues same as direct appeal of denial of immunity to other defendants), the plaintiffs in this case have not filed a cross-appeal. In all of the above cases, the court of appeals considered an exercise of jurisdiction to consider otherwise non-appealable issues raised by an appellant or cross-appellant. Thus, in Idarado, Tri-State, Petrini, Hill, Dube and Barrett, the only pendent issues considered were those raised by an appealing party. In no case

did a court reach out to decide an issue when the party adversely affected had not appealed the adverse order. Accordingly, we simply do not have jurisdiction over the due process and privacy issues. Appellate resolution of those issues must await another day.

A.

Plaintiffs Clark and Sharon Snell use their private home as a foster care environment for children whose natural parents are unable to care for them.[2] The

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[2]The district court has done an admirable job of distilling the pleadings into a lengthy set of undisputed facts, and facts deemed established for purposes of summary judgment, viewing the evidence in the light most favorable to the plaintiffs who opposed a grant of absolute or qualified immunity, Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986). See Snell, 698 F.Supp. at 1548-56. Our factual summary

Snells' natural and adopted children, as well as children the Snells care for under various guardianship and custody arrangements, reside in the home. On August 26, 1987, defendant Padley applied to the juvenile division of the state district court seeking the court's assistance with a DHS investigation, after the district attorney, who normally would file such an application, refused repeatedly to become involved. The supporting grounds of the application provided in part:

> 1. DHS has received allegations of neglect, lack of supervision, child prostitution and child pornography in the Snell's home in violation of 21 O.S. §§ 843-48.
>
> 2. DHS has received allegations that the Snells are effectively operating an unlicensed emergency shelter, child care facility, or foster home in violation of the Oklahoma Child Care Facilities Licensing Act, 10 O.S. §401 et seq.

> 3. DHS has been unable to complete the child abuse investigation due to lack of cooperation by the Snells.
>
> 4. Due to the child abuse allegations and reports received of numerous children being placed into and out of the Snell's home, DHS is concerned regarding the health, safety and welfare of the children residing with the Snells. The number and identity of the children residing with the Snells is unknown.

In re Child Abuse and Licensing Investigations of the Clark and Sharon Snell Home by the Oklahoma Dep't of Human Serv., Application at 1 (Okla. County Dist. Ct. Aug. 26, 1987), reproduced in rec. vol. I, doc. 1, ex. A. Primarily on the strength of the allegations of pornography, prostitution and denial of access to the children, the state district judge issued an ex parte order authorizing DHS personnel, accompanied by the police, to enter the Snell residence and investigate these allegations. In re Child Abuse and Licensing Investigations of

the Clark and Sharon Snell Home by the Oklahoma Dep't of Human Serv., Ex Parte Order at 1 (Okla. County Dist. Ct. Aug. 26, 1987), reproduced in rec. vol. III, doc. 114, ex. A. The ex parte order directed that the children in the Snell home be placed in protective custody if the Snells could not produce a valid custody order for each child or if the welfare of the children was endangered. Id. at 1-2. Because the Snells could not produce documents evidencing court-ordered custody, seven children were removed from the home and placed in a juvenile shelter. At a subsequent hearing, the police detective involved in the case testified that the only allegations of child pornography came from defendants Asbury, Levingston and Sweptson. Rec. vol. III, doc. 114, ex. 0 at 68; see also id., ex. W at 18-19 (tracing

pornography and prostitution allegations to defendant Levingston). Although two complaints about the lack of supervision and order at the Snell residence had occurred, Snell. 698 F. Supp. at 1549, the child prostitution and pornography allegations were groundless, assuming arguendo that such allegations were ever received.

B.

The Snells and certain DHS employees have experienced less than an amicable relationship. A variety of alleged complaints against the Snells, ranging from improper supervision to failure to return children, have been processed by DHS over the years. The Snells have complained in turn about various DHS employees and custody decisions made by DHS.

In 1986, the Snells complained to DHS on two occasions concerning DHS social

workers. First, the Snells complained about a DHS worker's "inappropriate visit" to their home and questioning of Mrs. Snell. Rec. vol. III, doc. 114, ex. P at 3. Second, they disagreed with a DHS determination that a child who had been placed in the Snell home for over one year should be returned to the natural mother. Id. at 4. The Snells were uncertain that the mother was capable of taking care of the child and complained that a DHS worker had inaccurately reported information furnished by them. Id. In February 1987, they complained to the DHS, the governor's, the attorney general's and the district attorney's offices about a DHS worker handling a case in another county. Id. The Snells believed that the case was mishandled and the father involved was using AFDC payments to pay restitution rather than feed

his children. Id. According to the Snells, the children were neglected, lacked adequate food and may have been subject to physical abuse. Id. Allegedly, DHS revealed Sharon Snell's name to the father and the father threatened her. Id.

The Snells have had frequent visits from DHS personnel since they adopted their first child in 1981. Id. at 1. They list nine different DHS workers who have visited the home and state: "We have never denied agents of the Oklahoma Department of Human Services access to our home." Id. at 1-2. In April 1987, two DHS Licensing Division employees (Prins Anderson and Judy Collins) made an on-site visit to resolve various complaints about the Snells and to determine whether they were in compliance with state licensing laws. The DHS employees determined that "the Snells are not in

violation of the Child Care Facilities Licensing Act." Rec. vol. III, doc. 114, ex. S at 2.

DHS social worker David McClain investigated the Snell home in July 1987, based upon an anonymous complaint of neglect and inadequate supervision. See rec. vol. II, doc. 115, ex. U. Plaintiffs' evidence indicates that the report generated by this visit did not indicate a problem with care:

> The interior of the home was remarkably clean and organized with this many children about the house. The worker counted 11 children in the house. The children were clean; appeared to be in good physical health and appropriately clothed. There was evidence of daily housekeeping activity. The older children were assigned age appropriate chores to be done on a daily basis. The children gave the appearance of being well fed and happy to be a part of this household.

Rec. vol. II, doc. 115, ex. V (Form CWS 14-A). The Snells would not identify the children in their care and McClain raised several questions about this in his report.[3] While McClain was present, the

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[3]The report contains the following questions:

> 1) How many of these children were legally adopted by the Snells' [sic]?
> 2) How many children reside in this home by actual parental agreement or a guardianship order?
> 3) Are Mr. and Mrs. Snell continuing to provide short term/long term care for children in the absence of their parents?
> 4) Is the Snell home an actual extension of the Jesus House thereby requiring a certificate of need and other licensing requirements as set forth by the State of Oklahoma?
> 5) Are the donations received by Mr. and Mrs. Snell going directly to provide for these children's needs?
> 6) Are the lives of these children in jeopardy because this home appears to be exempt from all-City-County-State-Federal licensing requirements as well as

Snells were in telephonic contact with their counsel. The Snells maintain that McClain indicated such disclosure was voluntary. Rec. vol. III, doc. 114, ex. P at 5, ¶ 6. They told McClain that the children in the home were adopted or were wards pursuant to legal guardianship or were there by parental consent. Id. McClain's report, also signed by defendant Sweptson, indicates that the investigative findings were uncertain and that a copy of the report would be provided for information only to the district attorney for Oklahoma County Juvenile Court. Rec. vol. II, doc. 115, ex. V. The report's recommendation to the district attorney for the Oklahoma County Criminal

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> prudent judicial review concerning issues of custody and placement of minor children in the absence of their parents?

Rec. vol. II, doc. 115, ex. V.

Court was that additional investigation concerning possible criminal prosecution of "non-accidental physical or mental injury, sexual abuse or neglect appears indicated." Id. This recommendation is paradoxical given that the report makes no mention of such allegations.[4]

The Snells maintain that during his investigation, McClain made derogatory comments concerning them to neighbors and told one that the Snells had been "run out of Bethany." See rec. vol. I, doc. 63 at 9; Id. vol. III, doc. 114, ex. D at 42. This prompted a July 20, 1987 meeting between Clark Snell and DHS officials in which Snell

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[4]Plaintiffs have provided evidence which indicates that the CWS 14-A report produced for discovery differs from the original and omits allegations of child abuse, child pornography and child prostitution. See Rec. vol. II, doc. 115, ex. J at 39-41.

aired his complaints about DHS. These complaints were referred to Lissa Vernon, the supervisor of Child Welfare Field Services, DCYS, who in turn referred them to Mary Asbury, the district supervisor in Child Welfare Field Services. Rec. supp. vol. II, doc. 150, ex. A at 24-25.

Vernon also referred a complaint about the Snells to Asbury. In a memo dated July 23, 1987, Asbury discussed various allegations against the Snells: 1) they misled unnamed parents into granting them custody of children as an alternative to child welfare services (CWS), 2) they frequently complained about DHS personnel, 3) the Snells' reporting of abuse and neglect to CWS "was more like harassment as the Snells called demanding an investigation be done immediately, several times in a

short period of time," 4) various neighbors complained about the number of children in the Snell home and the quality of care, 5) Mr. Snell was "vague" about the source of his financial assistance to operate his home, 6) although Mr. Snell claimed that his principal source of income was from an appliance repair business, a business listing appeared only in the white pages of the telephone directory without an address, 7) the assessor's office did not list Mr. Snell as an owner of his home, which was valued at approximately $150,000, and 8) after a complimentary article about the Snells ran in the newspaper, CWS received a call from the Warr Acres police alleging that they were known drug dealers. Rec. vol. II, doc. 115, ex. I1. The tenor of Asbury's report is best described in its con-cluding paragraph:

> In conclusion, we have a couple who on the surface appear to be wonderful philanthropic people who only want to care for children with no bureaucratic red tape. However, legitimate questions can also be raised regarding their ability to care for this number of children; the actual facts regarding these children coming into their care; the quality of the care and the source of funding.

Id. DHS continued its investigation, concentrating on complaints about the Snells, rather than complaints by the Snells about DHS.

C.

DHS received three adverse reports concerning the Snells in late-July and early-August 1987. A neighbor complained that children from the Snell home lacked adequate supervision when playing. Id. ex. Z at 1. An in-law of Mrs. Snell's son complained that the Snell house was dirty and the children were neglected. Id. at 2-3

and Fails depo. at 40. A retarded eleven-year old boy, G.H., whose mother could no longer cope with his severe emotional disorders, was the source of another complaint. G.H. alleged that during a temporary stay at the Snell home, Mr. Snell struck and kicked him and told him he could either go to jail, stay with the Snells, or be killed. Rec. vol. II, ex. B1 (CWS 14-A report). Mr. Snell and his housekeeper indicated that G.H.'s mental problems, including sexual and physical aggressiveness, and physical problems, including encopresis, were beyond what the Snells could handle given their responsibilities to the other children in the home.

Asbury assigned the investigation of these complaints to defendant Sieck, rec. vol. I, doc. 93, ex. 1 at 2, who in turn assigned the investigation to defendant

Levingston, Id. ex. 6 at 1. However, action on investigating these complaints was deferred, contrary to DHS policy concerning these types of allegations. See DHS Child Welfare Services-Child Abuse/Preventive Services Procedures § 622.4 (10/1/84), reproduced in rec. vol. III, doc. 114, ex. I. Two days later, on August 12, 1987, a DHS meeting was held between Asbury, Vernon, defendant Padley and licensing division employees Collins and Anderson to discuss a variety of topics concerning the Snells, including: 1) the large number of children in and out of the home, 2) claims by Jesus House[5] clients that the Snells threatened to call DHS if the parents did not release their children, 3) Clark Snell's criminal

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[5]Jesus House is a shelter for the homeless. The Snells have worked there as volunteers and remain in contact with the personnel who operate the shelter.

conviction and sub-sequent incarceration (1974-75) and his failure to disclose this in adoptive home studies, 4) Clark Snell's income and the likelihood that it could be derived from his appliance repair business given that the business was listed only in the white pages of the telephone directory, 5) Asbury's incorrect belief that DARE (Drug Addict Recovery Enterprises, Inc.) did not exist and therefore could not be providing support to the Snells, 6) whether the Snells could be named guardians based upon a signed and notarized parental statement, and 7) Clark Snell's refusal to identify the children in his care when asked by social worker McClain. Rec. supp. vol. II, doc. 150, ex. D at 201-24. A decision was made to refer these matters to the police for investigation and to contact assistant

investigation and to contact assistant district attorney Rebecca McNeese for her assistance. Id. at 223-24.

At the request of defendant Levingston, detective J.M. Einhorn met with defendants Sweptson and Asbury on August 14, 1987. Rec. supp. vol. II, doc. 150, ex. G at 49-50. The defendants expressed concern that: 1) a large number of children and adults were entering and leaving the house at all hours, 2) the Snell home was not licensed,[6] 3) the Snells had refused to disclose the identity of all the children to DHS and 4) Clark Snell had not disclosed his criminal record to DHS. Id. at 51-57. The lower court viewed this meeting as "the genesis of

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[6]Detective Einhorn testified on deposition that this department did not routinely investigate licensing violations. Rec. supp. vol. II, doc. 150, ex. G at 54.

the pornography and prostitution suspicions." Snell. 698 F. Supp. at 1550.

Detective Einhorn's testimony concerning the source of the pornography and prostitution allegations is incon-sistent. At the hearing held the day after the seven children were removed from the Snell home, he testified that these allegations were first made by DHS, specifically Asbury, Sieck and Sweptson, rec. vol. III, doc. 114, ex. 0 at 68; at a later deposition, he testified that the allegations were generated during a discussion between Sweptson, Asbury and himself. Rec. supp. vol. II, doc. 150, ex. G at 106-07. He could not say who initiated the allegations. Id. Einhorn indicated also that suspicion concerning child prostitution and pornography arose once he and DHS were informed that Clark Snell was sought for

questioning by FBI special agent Leslie Treece. Id. at 53.

Agent Treece sought Clark Snell merely to comply with a request for information from another FBI district concerning a child prostitution investigation. The FBI was investigating a person suspected of using his children for child prostitution, and this person had stayed at Jesus House for a short time. The FBI merely wanted to ask Clark Snell some questions about the suspect. As DHS was well aware, Clark Snell never was a subject of that investigation.

According to agent Treece, some time prior to August 26, 1987, detective Einhorn asked her to contact defendant Levingston based upon "complaints regarding possible child pornography or prostitution, or something unusual going on at the Snells' house." Rec. vol. III, doc. 114, ex. W at

16. Agent Treece met with Asbury and defendant Levingston. Rec. vol. I, doc. 160, ex. 7 at 242-44. Asbury understood that agent Treece was seeking to interview Clark Snell in connection with a man from out-of-state who had passed through Jesus House, but that Clark Snell was not the subject of inquiry. Id. at 244.

Agent Treece indicated that this was the first time she had heard about allegations concerning child pornography or prostitution in relation to the Snells. She spoke to defendant Levingston who indeed made such allega-tions in the context of discussing complaints received by DHS against the Snells. Rec. vol. III, doc. 114, ex. W at 17-19. When the order authorizing police intervention into the investiga-tion finally was obtained from Judge Brown, defendant Levingston invited

agent Treece to be present when the order was enforced. Id. at 24-25. However, Treece declined as there was no evidence of any violation of federal law. Id.

D.

Rebecca McNeese, assistant district attorney and the team leader of the juvenile division at the district attorney's office, was familiar with the DHS investigation of the Snells because DHS repeatedly sought to involve the juvenile division. McNeese indicated that her division viewed seizure of children from a caretaker as appropriate only when there is a showing of imminent or actual harm to the child. Rec. vol. II, ex. J at 7-11, 14. Normally, DHS would first contact police so the police could determine whether a child needed to be placed in custody. Id. at 11-12. If the DHS worker decided to pursue a court order

through the juvenile division, the DHS worker would complete a report of the investigation (Form CWS-14A) and forward it to the juvenile division for review. Id. at 11. McNeese indicated that for strong policy reasons the division would not seek a pick-up order based upon a representation of a DHS worker that parents or guardians were uncooperative without some evidence of abuse or neglect. Id. at 15. On August 18 or 19, 1987, McNeese was approached by defendant Padley for a "favor" regarding the Snells. Id. at 29. McNeese cut the conversation off abruptly and did not learn what favor was sought. Id.

Plaintiffs' evidence in this case tends to show that the DHS searched for a statute upon which to base their investi-gation of the Snells. Thus, DHS expressed concern with whether the Snells had guardianship of

more than five unrelated children, see Okla. Stat. Ann. tit. 58, § 773 (West 1965) (renumbered as tit. 30, § 4-101 (1990 Supp.)).[7] For reasons hardly clear, Asbury

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[7]Okla Stat. Ann. tit. 58, §773 (West 1965), then provided:

> No person shall be appointed guardian of any minor or minors, or other person or persons who is, at the time of the hearing of the application for appoint, the guardian of as many as five persons, other than his or her own family or relatives; provided that the provisions of this Section and Section 774 of this Title [58] shall not apply to boards of control and superintendents of eleemosynary or charitable institutions, under the control and charge of the state, where under the law such boards of control and superintendents may be appointed as guardians of the estates, or of the persons, of those committed to their charge or safekeeping; provided, the provisions of this Act [Okla. Stat. Ann. tit. 58, §§773, 774] shall not prohibit the appointment of officers or managers of fraternal or benevolent orders or homes and church orphanages as to inmates of such institutions.
> ...

and defendant Levingston also were concerned with the words "upon conviction" as used in Okla. Stat. Ann. tit. 10, § 410 (West 1987)," insofar as those words might apply to the Snells. See rec. supp. vol. II, ex. K at 110.

About a week before Judge Brown entered the order authorizing investigation and

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A violation of the above statute is a misdemeanor. Okla. Stat. Ann. tit. 58 §774 (West 1965) (renumbered as tit. 30, §4-102 (West Supp. 1990)).

[8]Okla. Stat. Ann. tit. 10, §410 (West 1987), part of the Child Care Facilities Licensing Act provides:

> Any person or agent, representative, or officer of any child care facility who violates any of the provisions of this act shall, upon conviction, be deemed guilty of a misdemeanor and punished in accordance with the provisions of 21 O.S. 1961, §10. Whenever any agent, representative, or officer of any child care facility shall be convicted under authority of this act, such conviction shall be sufficient grounds for the revocation of the license of said licensee.

conditional temporary custody, defendant Sweptson arranged a meeting with Clark Snell. Snell states that he was told to come without counsel, and that Sweptson was concerned about leaks to the press. Rec. vol. III, doc. 114, ex. E1 at 13. Sweptson then discussed the allegations of abuse made by G.H. against the Snells. Id. at 12-14. According to Snell, Sweptson told him, "'You know, anything could happen with that.'" Id. at 14. Snell then said: "'You know we haven't done anything wrong. And why can't we have these other people at the meeting at the State Office like we did before.'" Id. To which Sweptson allegedly replied: "'You don't have to do anything wrong out here. All we have to do is shuffle some papers around, and we can make anything fit.'" Id.

E.

The events of August 19, 1987 as portrayed by plaintiffs' evidence represent the first attempt to enter and remove the children from the Snell home so as to proceed with the investigation. Upon the instructions of Asbury, defendant Levingston went to the police station and talked with Captain Griffith about the guardianship statute, supra note 7, and the allegations against the Snells. Rec. supp. vol. II, doc. 150, ex. K at 53, 56-57. Defendant Levingston voiced her belief that the statute in view of the allegations justified police assistance with the investigation in the form of picking up the children. Id. at 58. Captain Griffith wanted to see the statute before intervening; later that day, Hilde Lillegaard of the DHS licensing division and defendants Sieck and Levingston returned to the police station with a copy

of the statute, but the sergeant on duty told them that he would need a court order before he could pick up the children. Id. at 54-55, 59. Defendant Sieck then informed Asbury of this turn of events. Rec. vol. I, doc. 160, ex. 7 at 264. About 6:30-7:30 p.m., defendant Sieck telephoned Asbury requesting the telephone number of Judge Brown. Id. at 264-65. Asbury and defendant Sieck were unable to reach Judge Brown; however, Asbury did reach Judge Wilson of the juvenile division. Id. at 265. Judge Wilson wanted to speak to them in person before intervening. Id.

Lillegaard and defendants Sieck and Levingston apparently made a field visit to the Snell neighborhood on the evening of August 19. From the home of one of the Snells' neighbors, defendant Sieck then called Judge Brown and advised him that the

Snells might be moving. Rec. supp. vol. II, doc. 150, ex. K at 77. She told Judge Brown of the allegations against the Snells, of the suspected violation of the guardianship statute and that the police sergeant on duty would not pick up the children without a court order. Id. at 79. Judge Brown advised that he would issue an order if she thought it was an emergency, but that he would need the number of the police station. Id. at 80-81. Although defendant Sieck viewed the situation as constituting an emergency, defendant Levingston told the judge that they would get back to him with the number of the police station if they decided in favor of a removal order. Lillegaard and defendants Sieck and Levingston then called defendant Padley to update her on the evening's events; Padley indicated that she did not agree that a

violation of the guardianship statute warranted removal of the children. Id. at 84-85.

Apparently, assistant district attorney McNeese later was contacted by Judge Brown concerning this DHS attempt of August 19 to obtain a removal order; she indicated to the judge that DHS simply had no evidence of abuse or neglect.[9] Rec. vol. II, ex. J at 26. McNeese understood that the judge was

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[9]DHS policy concerning the preparation of a case for court provides:

> All observable information is recorded precisely and quantitatively. In recording evidence designate where, who, how long, what time, and how many. If impressions are recorded, they are designated as such and related to observed activities.

DHS Child Welfare Services-Child Abuse/ Preventive Services Procedures §§623.6(D) (19/1/84), reproduced in rec. vol. III, doc. 114, ex. I. This procedure obviously was not followed concerning the allegations of child prostitution and pornography which form the basis of this case.

willing to consult with the police, but not authorize a removal order. Id.

The next day, August 20, 1987, assistant district attorney Steve Sullins was approached by defendant Sieck for a pick-up order based upon the Snells' alleged violation of the guardianship statute. Id. at 28. Sullins com-municated this to McNeese, who wrote a memo to the DHS court liaison, Kathy O'Malley, expressing her displeasure with the DHS attempt to "shop" for a DA who would cooperate in obtaining a removal order given DHS' lack of written evidence. Id. at 27-28.

F.

Around August 24, 1987, Asbury gave defendant Levingston a copy of a statute contained in the Child Care Facilities Licensing Act, supra note 8, which used the words "upon conviction." Rec. supp. vol.

II, doc. 150, ex. K at 107. Defendant Levingston then sought an interpretation of the statute's applicability to the Snells from several sources including another assistant district attorney, Mary (Mimi) Smith. Id. at 107-08. When the DHS court liaison learned that the Levingston's inquiry involved the Snells, the liaison indicated that the inquiry should not be made because of McNeese's directive. Id. at 108-09. Defendant Levingston, with the approval of defendants Sweptson and Sieck, then approached Judge Brown for an interpretation of the statute and ostensibly learned that the "upon conviction" language "did mean that it was a misdemeanor and that the parents could be arrested." Id. at 114.

To defendant Levingston, this meant that the Snells could be arrested, but on August 26, 1987 she asked detective Einhorn

to call the judge and confirm her understanding of the judge's interpretation. Id. at 116-17, 118-119. Between 9:00 and 9:30 a.m., defendant Levinston learned from Einhorn that Judge Brown was inclined to issue a pick-up order. Id. at 118. Detective Einhorn called Padley indicating that Einhorn had talked with Judge Brown. Rec. vol. III, doc. 114, ex. C at 157. The judge initially had indicated that the order would be issued to the police, but now, at least according to Einhorn, the judge wanted an application from DHS, rather than the district attorney. Einhorn wanted defendant Padley to file an application which would provide the basis for entry of such an order. Defendant Padley testified on deposition that she was reluctant to do so without checking with the district attorney first. Id. at 158. She

instructed Einhorn to check with the district attorney; Einhorn checked and reported that the assistant district attorney considered the Snells "a DHS problem and the DA's office is not going to get involved." Id. at 159. Defendant Padley felt that Einhorn "was attempting to put some pressure on me to take an action." Id. at 158.

According to defendant Padley, she then recounted to Einhorn her understanding of the Snell situation to date:

> I told him that I knew we had pending child abuse allegations in the Snell household, both neglect and abuse, and that I knew the FBI has contacted us in reference to the Snells and had indicated they wanted to contact Mr. Snell in connection with an investigation they were doing in child prostitution and pornography, but that there were no allegations that the Snells were involved in child prostitution, pornography, trafficking of children.

> I then asked him if he knew of anything I didn't know. . . .
>
> He [Einhorn] indicated yes, there was, that he had information that led him to believe and that he was investigating an allegation of child prostitution and pornography as to the Snell home. . . .
>
> He [Einhorn] indicated to me that he had been in touch with an out-of-state police department, and that there was some connection between a person that this out-of-state police department was investigating in connection with child prostitution, pornography, trafficking in children, and the Snells, and that this person was traveling back and forth between the states into the Snell household.

Id. at 160-163. According to defendant Padley, Einhorn "said that he had allegations that the Snells were involved in child prostitution, pornography and trafficking children." Id. at 164. Defendant Padley would later learn that there were no such allegations.

Defendant Padley may not have been the only one who was led by Einhorn to believe

that there was more information concerning the Snells and child prostitution and pornography; Judge Brown "was really taken aback" by the limited nature of Einhorn's testimony after the children were picked up, given Einhorn's earlier representations which led to the issuance of the removal order. Rec. vol. III, doc. 114, ex. D1 at 44; see also id. at 46.[10]

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[10]Judge Brown testified on deposition:

> Q: If Detective Einhorn [at the later hearing] had denied relating any allegations involving nefarious sexual activity like child prostitution, child pornography, or child trafficking while he was under oath, what would be in direct contradiction to what he told you wouldn't it?
>
> Judge Brown: That's correct.

Rec. vol. III, doc. 114, ex. D1 at 46.

G.

The day of August 26, Judge Brown contacted defendant Padley, and she returned his call to find that he was on the bench, but that he wanted to set up an appointment. Rec. vol. III, doc. 114, ex. C at 159, 165. At some point during the day, defendant Padley contacted Judy Collins in the DHS licensing division. Rec. vol. III, doc. 114, ex. C at 187. According to Collins, defendant Padley discussed the idea of "getting an order to force the Snells to cooperate as it relates to licensing and looking at papers and things like that," and asked her opinion. Rec. vol. III, doc. 114, ex. N at 47. Collins expressed her view that if it was solely a licensing issue, another field visit to the Snells was in order to request documentation on the children. Id. at 49-50.

Later in the day, defendant Padley spoke with Judge Brown. He wanted her to file an application so that the court could assist in the investigation and protect the children. Id., ex. C at 169. Judge Brown relied upon defendant Padley to coordinate the factual information in the case. Id., ex. D1 at 41-42. She told Judge Brown that she would get back to him. Id., ex. C at 169. Defendant Padley then attempted to contact DHS personnel including Charles Waters, Conley Tunnell, Lissa Vernon, Prins Anderson and Mary Asbury, but was unable to reach them. Rec. vol. I, doc. 96, ex. 3 at 184. Tunnell, Vernon and Asbury have stated affirmatively that they were not involved in the events of August 26. Id. ex. 1 at 7, ex. 9 at 2, ex. 10 at 2-3. Defendant Padley did talk with defendants Sweptson, Levingston and Sieck and someone in the

licensing division before preparing the application and walking it over to the judge's office. Rec. vol. III, doc. 114, ex. C at 187. The judge looked at the application and began dictating his order. Id. at 188.

Defendant Padley delivered the application and order to defendant Levingston, who reviewed the order along with defendants Sieck, Padley and perhaps defendant Sweptson. Rec. vol. I, doc. 96, ex. 6 at 2. Lillegaard and defendants Sieck and Levingston took the order to the police station and presented it to Sergeant George Johnson for enforcement. Id. at 3. On August 26 at about 5:30 or 6:00 p.m., Lillegaard and defendants Sieck and Levingston accompanied the police to the Snell residence and seven children were removed based upon lack of custody

documents. Id. at 3. The housekeeper reported to Mrs. Snell that the group led by the DHS social workers just barged in without knocking or ringing the doorbell and proceeded to gather the children. Rec. vol. III, doc. 114, ex. D at 50-51. In gathering the children, Sergeant Johnson "observed that the house was generally clean and neat. and he "saw no obvious indications of child abuse or neglect." Id. ex. E at 2. Defendants Sieck and Levingston actively assisted in the police investigation in the home.

Plaintiff Sharon Snell (Mrs. Snell) arrived at home about thirty minutes after the police and DHS social workers arrived. Id. ex. D at 3. She was presented with a document which included allegations that the children were unsupervised while riding bicycles and were left at the neighbors for

extended periods. Id. at 14-15. According to Mrs. Snell, defendant Levingston attempted to talk to her, but Mrs. Snell went into her bedroom and attempted to phone her husband at work and Sister Ruth at Jesus House. Unable to reach them, Mrs. Snell finally reached Eloise Harris, a DHS social worker. Id. at 11-13 Again, according to Mrs. Snell, defendant Levingston grabbed the telephone, slammed it down and said: "'If you don't let me--If you don't talk to me, I will get the police in here and they will make you talk to me.'" Id. The social workers then insisted on seeing the paperwork on the children "and if I did not cooperate, . . . the police would force me to cooperate. That's what they were there for." Id. at 15.

Mrs. Snell then went from the bedroom to a desk in the living room which had the

files on the children. According to Mrs. Snell, upon seeing the first court order on one of the children, defendant Sieck said: "'That is not a legal document because it was rubber stamped [by the Oklahoma County District Court Clerk].'" Id. at 16. In the presence of defendant Levingston, defendant Sieck then directed the police: "To load up these kids, this lady does not have any legal documents on these kids." Id. Mrs. Snell then returned to her bedroom and gave the housekeeper permission to show the records to the social workers and police. Id. at 18. During this time, Mrs. Snell tried to call Hilde Lillegaard at DHS, not realizing that Lillegaard was present and making repeated apologies. Id. at 18, 34. Over an hour later, after the police and social workers had gone through all of the Snells' files, the police had a list of

seven names for which no court custody documents had been found. Id. at 23; Id. ex. E at 4. Sergeant Johnson asked defendants Sieck and Levingston if the seven children could be left with the Snells overnight because the Snells were likely to get the matter taken care of the next day. Id. ex. C at 24; Id. ex. D at 4. Defendant Sieck responded: "'They could run with the kids. It's happened before.'" Id. ex. C at 25. According to the sergeant, he was told by DHS workers that the court's order directed removal of the children in the absence of valid court orders concerning custody and that the circumstances in the home would not allow for interviews with the children. Id. ex. D at 4. Accordingly, Sergeant Johnson decided to take the children into custody.

All during this time, the children had been placed in groups. Id. Defendant Levingston inquired about Patricia Turtle, a child with medical problems. According to Mrs. Snell, defendant Levingston then told a nearby police officer that, "'no Indian tribe would ever leave a child in this home.'" After the decision had been made to take the children, Mrs. Snell asked defendants Sieck and Levingston if two of the seven children could remain because efforts were being made to contact their natural mother. Id. ex. C at 30. This request was denied by both defendants with the comment that the natural mother could see her children at the shelter. Id.

As the DHS workers gathered the seven children, one of the children ran upstairs in an effort to hide and was retrieved forcibly by defendant Sieck. Id. at 31-32.

At approximately 7:30 p.m., the seven children were taken in the rain, without blankets, without car seats for the very young and without necessary medicine,[11] to the Oklahoma County Juvenile Center. Id. ex. D at 35, ex. E at 5, ex. F. When one of the bystanders asked if blankets would be used to cover the children given the rain, defendant Levingston reportedly said: "'Children of this culture are used to the elements.'" Id., ex. D at 35.

H.

The next day, the Snells learned from counsel of the damaging child prostitution

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[11]Defendant Levingston indicates that Mrs. Snell and other adults at the Snell home refused to cooperate in getting the children ready to leave and became somewhat abusive. Rec. vol. I, doc. 96, ex. 6 at 3. This is corroborated by Sergeant Johnson, who indicated that the situation deteriorated as the children were removed. Id. at ex. 7 at 5.

and pornography allegations. Id. at 53-54. Not revealing these damaging allegations earlier is directly contrary to the spirit, and the letter, of DHS regulations concerning mandatory disclosure by social workers in the course of child abuse investigations. See DHS Child Welfare Services-Child Abuse/Preventive Services Procedures §§ 622.4, 623.7(A)[12] (10/1/

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[12]Under the title of "Due Process Procedures," the DHS manual provides:

> A. Right to Be Informed of Allegation. Parents must receive a clear, precise explanation of allegations that have been presented. The explanation of allegations must occur immediately upon initial contact with the parent(s)/guardian. The worker also advises them of the agency's role in relation to the allegation, and of the statutes that exist to protect children in Oklahoma.

DHS Child Welfare Services-Child Abuse/ Prevention Services Procedures §623.7(A) (10/1/84), reproduced in rec. vol. III, doc. 114, ex. I.

84), reproduced in rec. vol. III, doc. 114, ex. I. At the hearing of August 27, 1987, detective Einhorn testified that the allegations of child prostitution and pornography arose in DHS through Asbury[13] and defendants Levingston and Sweptson. Rec. vol. III, doc. 114, ex. 0 at 68. On cross-examination, he denied having any other information. The allegations of child prostitution and pornography were not even colorable, and all involved concede that a removal order plainly would be unwarranted merely to learn the identities of the children in the Snell household, their relationship to the Snells, and to conduct another review of the licensing situation. See rec. vol. III, doc. 114,; ex. C at 277-

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[13]The federal district court appears not to have considered this evidence linking Asbury to the ultimate issuance of the order.

78 (Padley); ex. N at 60 (Collins); ex. D1 at 43 (Judge Brown).

II.

Defendants first contend that they are entitled to absolute immunity in this § 1983 action because their activities as social workers are intimately associated with the judicial process. According to defendants, "[r]esponding and investigating reports of child abuse or neglect, requesting assistance from the court in making that response, and accompanying police officers executing orders of the juvenile court are functions intimately associated with the judicial phase of the juvenile court's jurisdiction." Brief of Defendants-Appellants at 29. We reject this broad proposed standard as out of step with absolute immunity precedent.

A.

The Supreme Court has recognized the defense of absolute immunity from civil rights suits in several well-established contexts involving the judicial process. A judge acting in his judicial capacity is absolutely immune from such suits, unless the judge acts clearly without any colorable claim of jurisdiction. Stump v. Sparkman, 435 U.S. 349, 356-57 (1978); Pierson v. Ray, 386 U.S. 547, 553-55 (1967). A prosecutor is absolutely immune for activities which are "intimately associated with the judicial process" such as initiating and pursuing a criminal prosecution. Imbler v. Pachtman, 424 U.S. 409, 430 (1976). However, the same immunity traditionally does not extend to a prosecutor's actions which may be classified as administrative or investigative. Id. at 430-31; Harlow v. Fitzgerald, 457 U.S. 800,

811 n.16 (1982). Witnesses, including public officials and private citizens, are immune from civil damages based upon their testimony. Briscoe v. La Hue, 460 U.S. 325, 341, 345-46 (1983). In deciding questions of immunity, the Court has taken a functional approach after considering the history of common law immunity. Thus, in Butz v. Economou, 438 U.S. 478, 508, 515-17 (1978), the Court determined that agency officials who initiate and prosecute enforcement proceedings subject to agency adjudi-cation are entitled to absolute immunity.

The rationale for according absolute immunity in the civil rights context is to incorporate traditional common law

immunities[14] and to allow functionaries in the judicial system the latitude to perform their tasks absent the threat of retaliatory § 1983 litigation. Because the judicial system often resolves disputes that the parties cannot, the system portends conflict. Win or lose, a party may seek to litigate the constitutionality of circumstances which required him to endure a lawsuit or suffer defeat. Such suits by dissatisfied parties might target judges, see Valdez v. City & County of Denver, 878 F.2d 1285 (10th Cir. 1989), prosecutors and witnesses. Cf. Mitchell, 472 U.S. at 523. Though such suits might be satisfying personally for a plaintiff, they could

[14]These immunities were present in 1971 when §1983 was enacted as §1 of the Ku Klux Klan Act, 17 Stat. 13.

jeopardize the judicial system's ability to function.

Absolute immunity has its costs because those with valid claims against dishonest or malicious government officials are denied relief. Imbler, 424 U.S. at 427; Valdez, 878 F.2d at 1289. Still, the Court has determined that the smooth functioning of the judicial system takes precedence over those meritorious claims which will be foreclosed by granting absolute immunity. Such claims may find partial resolution through other means, however. The opportunity for subsequent judicial review of decisions made by prosecutors and for subsequent appellate review of lower court decisions provides a check upon actions clothed with absolute immunity. Mitchell, 472 U.S. at 522-23. And the grant of absolute immunity does not insulate an

official from the criminal process or professional discipline. Imbler, 424 U.S. at 429.

Thus, "[a]bsolute immunity is . . . necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." Butz, 438 U.S. at 512. A judge must be free to make decisions, often controversial, without concern about possible personal repercussions. Stump, 435 U.S. at 363-64. In deciding which cases to pursue and how they should be pursued, a prosecutor should not be distracted by the threat of subsequent and time-consuming and duplicative civil rights actions. Imbler, 424 U.S. at 424-26. Likewise, a witness must be free to testify without fear of a later civil action, so as not to deter

witnesses or influence their testimony. Briscoe, 460 U.S. at 333.

The more distant a function is from the judicial process, the less likely absolute immunity will attach. Thus, in Malley v. Briggs, 475 U.S. 335, 340-41 (1986), the Supreme Court reaffirmed that an officer applying for a warrant is not absolutely immune from suit, just as a complaining witness would not be entitled to such immunity. The Court reasoned that applying for a warrant "while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment." Id. The Court viewed a prosecutor's seeking an indict-ment as "the first step in the process of seeking a conviction," id. at 343; application for a warrant often

precedes this first step and serves a different function.

B.

Several lower courts have considered whether those involved in child protection and advocacy, including social workers and guardians ad litem, are entitled to absolute immunity. Consis-tent with Supreme Court precedent, the courts have taken a functional approach rather then one based purely on the status of the defendant involved. See Forrester v. White, 484 U.S. 219, 224 (1988). The courts have looked to the particular task a defendant was performing and its nexus to the judicial process rather than deciding that social workers or guardians ad litem as a class are entitled to absolute immunity. Although child dependency proceedings are civil in nature, they occur against a backdrop of

potential criminal prosecution of the abusive parent or caretaker. A social worker's investigation may result in the removal of children from the home and a referral to the district attorney for potential prosecution of a parent or caretaker. Thus, the civil nature of child dependency proceedings, per se, has not been a bar to absolute immunity for social workers. See Meade v. Grubbs, 841 F.2d 1512, 1532-33 n.18 (10th Cir. 1988) (extending absolute immunity to duty to initiate civil complaint after applying functional analysis).

The Ninth Circuit has adopted a rule of absolute immunity for child and dependency proceedings from origination until conclusion. In Meyers v. Contra Costa County Dept of Social Serv., 812 F.2d 1154, 1157 (9th Cir.), cert. denied, 484 U.S. 829

(1987), the court held that "social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child and dependency proceedings." However, absolute immunity did not extend to a social worker's ordering a father to stay away from his home prior to a scheduled court hearing because such a function was not quasi-prosecutorial or quasi-judicial. Id. at 1157-58. Such conduct was not that of an advocate, but rather unilateral action prior to the operation of the judicial process. Id at 1157.

Relying upon Meyers, the Ninth Circuit has held that a social worker seeking a court order for immediate apprehension of a newborn from her natural mother is entitled to absolute immunity for such quasi-prosecutorial conduct. Coverdell v.

Department of Social & Health Serv., 834 F.2d 758, 764 (9th Cir. 1987). In Coverdell, the social worker completed an affidavit used by the prosecutor in obtaining custody of the child. Id. at 760. Under a theory of quasi-judicial immunity, the court determined that the social worker was entitled to absolute immunity for executing the order by obtaining custody of the child and removing her from the hospital. Id. at 764-65. Most recently, the Ninth Circuit determined that absolute immunity for a social worker extends beyond the adjudication of dependency to final disposition of the case. Babcock v. Tyler, 884 F.2d 497, 503 (9th Cir. 1989), cert. denied, 110 S. Ct. 1118 (1990). Accordingly, social workers who had placed two children in a home where they were

sexually abused were afforded absolute immunity. Id.

The Sixth Circuit also has decided a trilogy of cases which help define the limits of absolute immunity for social workers handling child protection and advocacy matters. In Kurzawa v. Mueller, 732 F.2d 1456, 1457-58 (6th Cir. 1984), the court determined that social workers involved in prosecuting neglect and delinquency petitions in the Michigan courts were entitled to absolute immunity, along with a guardian ad litem who participated in proceedings leading to the removal of a child from his parents' home. Id. at 1457-58; see also Gardner v. Parson, 874 F.2d 131, 144-46 (3rd Cir. 1989) (guardian ad litem who testifies in court, prosecutes custody or neglect petitions, or makes reports and recommendations to court

entitled to absolute immunity). Thus, social workers filing a juvenile abuse petition which resulted in a temporary emergency custody order were entitled to absolute immunity. Salyer v. Patrick, 874 F.2d 374, 378 (6th Cir. 1989); accord Vosburg v. Department of Social Serv., 884 F.2d 133, 135 (4th Cir. 1989). However, opening a child abuse case, investigating it and placing a parent's name in a central registry concerning child abuse are not quasi-prosecutorial activities for which absolute immunity applies. Achterhof v. Selvaggio, 886 F.2d 826, 830-31 (6th Cir. 1989). Rather, these activities are administrative or investigative. Id.

Several cases applying a functional approach have declined to grant absolute immunity to social workers investigating child abuse allegations. In Spielman v.

Hildebrand, 873 F.2d 1377, 1382-83 (10th Cir. 1989), we declined to grant absolute immunity to a Kansas social worker and her supervisor based upon a decision to remove two children in preadoptive status from the home of the potential parents without an agency hearing. Applying a functional approach, we noted that the defendants' actions "in no way related to advocacy before a judicial body," and were not otherwise integral to the judicial process. Id. at 1383. Rather, the defendants' decision to remove the children from the home was unilateral and occurred before the judicial process intervened; accordingly, only qualified immunity was appropriate. Id.

An important prerequisite of absolute immunity in this context is that the defendant social worker "act as an actual

functionary of the court, not only in status or denomination but in reality." Gardener, 874 F.2d at 146. When the activity of the social worker is not integral to the judicial process, absolute immunity is not warranted. Spielman, 873 F.2d at 1383. In Hodorowski v. Ray, 844 F.2d 1210, 1214 (5th Cir. 1988), the court determined that the seizure of children in the absence of a court order under Texas law would not be protected by absolute immunity. The court reasoned that

> seizure without a court order in the face of an immediate danger seems to us more akin to the function of police than prosecutors. Policemen, not prosecutors, investigate dangerous situations and are charged with the duty, if necessary, to intervene to prevent injury. But policemen, like most other executive officials, are ordinarily not protected by absolute immunity . . . unless they are engaged in a function integral to the judicial

> process, such as testifying as witnesses . . . .

Id. (citations omitted). Likewise, in Austin v. Borel, 830 F.2d 1356, 1361-63 (5th Cir. 1987), the court determined that the filing of an allegedly false verified complaint, which under Louisiana law initiated temporary custody of a child, but did not initiate the judicial process concerning need of care pro-ceedings, was not entitled to absolute immunity. The court analogized the filing of a verified complaint by a child abuse worker to the seeking of an arrest warrant by a police officer; because absolute immunity would be inappropriate in the latter case, so too would it be inappropriate in the former. Austin, 830 F.2d at 1362.

C.

We next consider the authority of the DHS in this matter. DHS has the authority to investigate complaints concerning whether a child care facility is required to be licensed under the Child Care Licensing Act, Okla. Stat. Ann. tit. 10, §§ 401-410 (West 1987). Id. § 401(b) (necessity of license), §402(2) (child care facility defined), §403(b) (Act applies to private child care facilities), § 405(b) (prior to issuance of license, DHS "shall investigate the activities and standards of care of the applicant"); DHS Division of Child Welfare Services-Policy and Procedure-Licensing §§ 661 & 689 (3/15/79) (investigation of complaints), reproduced in rec. vol. III, doc. 114, ex. M. DHS is granted authority to investigate the conditions of a licensed child care facility and to require information concerning the children being

cared for by the facility. Okla. Stat. Ann. tit. 10, § 406 (West 1987). DHS also has authority to investigate complaints of child abuse and neglect.[15] Okla. Stat. Ann. tit. 21, §§ 845, 846 (West Supp. 1990); DHS Child Welfare Services-Child Abuse/ Preventive Services Procedures § 621 (10/1/ 84), reproduced in, rec. vol. III, doc. 114, ex. I.

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[15]As we understand this case, DHS seems to have been investigating allegations that the children in the Snells' care were "deprived children" within the meaning of Okla. Stat. Ann. tit. 10, §1101(4) (West Supp. 1990). A deprived child includes "a child who does not have the proper parental care or guardianship or whose home is an unfit place for the child by reason of neglect, cruelty or depravity on the part of his parents, legal guardian, or other person in whose care the child may be . . . ." Id.; see also DHS Child Welfare Services-Child Abuse/Prevention Services Procedures §623.5(B)(2) (10/1/84), reproduced in rec. vol. III, doc. 114, ex. I. A dependent and neglected child is a deprived child. Okla. Stat. Ann. tit. 10, §1101(4) (West 1990).

Under Oklahoma law, a preliminary inquiry shall precede the filing of a petition to adjudicate the status of an allegedly deprived child. Okla. Stat. Ann. tit. 10, §§ 1101(10), 1103(A) & (C) (1987 & 1990 Supp.). The purpose of the preliminary inquiry is to determine whether court action is necessary and to allow for informal adjustment. See Id. & Id. §§ 1101(1) & 1103(B). In Oklahoma County, where the events in this case took place, this function is accomplished by the Juvenile Bureau. See Okla. Stat. Ann. tit. 10, §§ 602(1), 1201(A), 1204(A) (West 1987). Thereafter, "[a] petition in a juvenile proceeding may be filed by the district attorney or the person who is authorized to make a preliminary inquiry to see if further action is necessary." Id. § 1103(B). "The petition is the first formal legal document

filed with the court and initiates Juvenile Court proceedings." DHS Child Welfare Services-Child Abuse/Preventive Services Procedures § 624.11 (10/1/84), reproduced in rec. vol. III, doc. 114, ex. I. When the petition is filed, the district court obtains jurisdiction over the child alleged to be deprived. Okla. Stat. Ann. tit. 10, § 1102(A) (West Supp. 1990).

Frequently, however, a child may be taken into custody before a preliminary inquiry is completed or a petition is filed. When a child is taken into custody before the filing of a petition, a petition generally must be filed and a summons issued within five judicial days. Id. § 1104.1(A) (West 1987); DHS Child Welfare Services-Child Abuse/Preventive Services Procedures § 624.11 (10/ 1/84), reproduced in rec. vol. III, doc. 114, ex. I. If a child is taken

into custody as a deprived child, see Okla. Stat. Ann. tit. 10, § 1104(d) (West Supp. 1990), the "child shall be taken immediately before a judge of the district court for the purpose of obtaining an order for protective custody." Id. § 1107(B). The parents or guardians are entitled to a hearing within forty-eight hours. Id. §1104.1(C) (West 1987); DHS Child Welfare Services-Child Abuse/Preventive Services Procedures § 623.7(c) (10/1/84), reproduced in rec. vol. III, doc. 114, ex. I; see also Okla. Stat. Ann. tit. 10, §1107(C) (West 1990) (detention hearing must be held within one or two judicial days, otherwise child shall not be detained).

In this case, an application was filed and an order for conditional protective custody issued before a preliminary inquiry or petition. Judge Brown indicated that in

practice an order for protective custody frequently precedes a petition. Rec. vol. I, doc. 131, ex. 17 at 75. Other courts have determined that social workers filing pleadings for temporary custody in advance of a formal petition are entitled to absolute immunity. Vosburg, 884 F.2d at 134; Salyer, 874 F.2d at 378. We think that this case requires a different outcome for two reasons. First, the application which resulted in the pick-up order was pre-adjudicatory and sought information which would be developed in other pre-adjudicatory procedures such as court intake or a preliminary inquiry that occur prior to the filing of a petition. See Okla. Stat. Ann. tit. 10, §§ 1101(8) & (10), 1102(A) (West Supp. 1990) ("Upon the filing of a petition, the district court shall have juris-diction of any child who is alleged to be . . .

deprived . . . ."). In this respect, the statutory scheme in Oklahoma, insofar as DHS is concerned, is similar to the Louisiana scheme construed by the Fifth Circuit in Austin; we think that the Austin approach is equally applicable to this case. See 830 F.2d at 1361-63. A social worker seeking a pre-petition order for protective custody functions like a police officer seeking an arrest warrant; a functional approach to immunity requires that those performing like functions receive like immunity. Austin, 830 F.2d at 1362.

The second reason why absolute immunity is not appropriate is that DHS policy indicates that DHS child welfare workers normally are to report findings of neglect or abuse, even those which might indicate a need for immediate intervention, to other authorities for further investigation or

advocacy in the form of initiation of court proceedings.[16] All of the challenged

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[16]See DHS Child Welfare Services-Child Abuse/Preventive Services Procedures §622.2 (district attorney may make determination as to need for further investigation or prosecution based on findings of DHS), §622.31 (contact local law enforcement authorities if immediate attention required), §622.4 (same), §622.4(B) (if cannot complete report due to lack of cooperation, contact law enforcement or complete report with information obtained), §622.41(B) (DHS investigation is an "official inquiry," not a police investigation); §622.43 (report of investigation sent to district attorney with recommendation); §623.3 (emergency placement and shelter care requests presented through district attorney or Juvenile Bureau; only when these sources cannot be reached may DHS worker contact district judge directly; peace officer or court employee is empowered to take child into immediate protective custody, if necessary), §623.4 (district attorney has discretion whether to file petition or pursue criminal charges), §623.7(D) (same), §624/11 (generally district attorney will decide whether there is sufficient evidence to proceed with a petition; district attorney or Juvenile Bureau prepares all pleadings and DHS workers do not sign petitions except in unusual or emergency situations with prior approval) (10/1/84), reproduced in rec. vol. III, doc. 114, ex. I.

actions of defendants Sweptson, Sieck and Levingston pertain to a DHS investigation of the Snells, an attempt to create a factual basis to justify intervention and confirm allegations predominantly, if not wholly, the product of speculation and conjecture. The defendants unsuccessfully sought police participation in their investigation before Judge Brown issued his order. Moreover, defendants Sieck and Levingston assisted with the investigation made possible by the court's order--a function associated with police work, not advocacy.

We agree with the district court that child welfare workers investigating claims of child abuse are analogous to law enforcement officers who are entitled only to qualified immunity. Snell, 698 F. Supp. at 1557. We also reject the defendants' argument that public policy requires

absolute immunity because claims of child abuse are involved. See Robinson v. Via, 821 F.2d 913, 919-20 (2d Cir. 1987) (rejecting absolute immunity for child abuse investigations on policy grounds and accepting "strong" argument for qualified immunity). We do so for two reasons. First, immunity is strictly construed; we do not function as a legislature in enacting immunity grounds. See Harlow, 457 U.S. at 811; Imbler, 424 U.S. at 421. Second, as stated by the district court:

> While the tasks of social workers who investigate child protection matters are clearly matters of compelling interest and importance to the public, how can it be said that when these investigators allegedly violate a citizen's constitutional rights they are entitled to absolute immunity, when highly trained FBI, DEA and Treasury agents facing identical allegations are entitled to only qualified immunity?

Snell, 698 F. Supp. at 1557. To this we might add that police officers engaged in the same conduct alleged in this case would not be entitled to absolute immunity. Austin, 830 F.2d at 1362. Thus, we overrule Oklahoma federal district court decisions which have determined that absolute immunity is appropriate for DHS social workers, to the extent that these decisions are inconsistent with the rule we announce today. See, e.g., Snook v. Lunsford, No. 87-C-550-B unpub. order (N.D. Okla. Mar. 24, 1988) [1988 WL 142120]; Guest v. Moore, 706 F. Supp. 786, 787-88 (W.D. Okla. 1987).

The actions of defendants Sweptson, Sieck and Levingston cannot be said to be integral to the judicial process, rather the DHS activity was more akin to police work. The licensing issue had been resolved in the Snell's favor by DHS licensing division

personnel in April 1987; however, DHS elected to reexamine the factual basis of the issue shortly thereafter and needed more information. The three subsequent referrals concerning neglect and abuse in the Snell home were investigated by DHS, and the DHS brought the results of that investigation to the attention of the district attorney's office, as normal procedure envisions. When the district attorney refused to become involved, the DHS defendants pursued the investigation further by contacting the police, who would not assist the investigation without a court order, and the district attorney, who again would not pursue the investigation because of a lack of evidence. Viewed in the light most favorable to the plaintiffs, the summary judgment evidence indicates that these defendants assisted or acquiesced in the use

of information known to be false concerning the Snells, i.e., involvement in child prostitution and pornography, in order to further the licensing investigation[17] and retaliate against the Snells. The use of that false information, as conveyed to Judge Brown, was undoubtedly responsible for the furtherance of the investigation by use of a court order to gain entry into the Snell home and custody of the seven children for which the Snells could. not produce court custody documents. Accordingly, defendants

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[17]It seems strange indeed for the DHS to have obtained an order authorizing detention of only those children for which the Snells lacked court custody documents, given purported allegations of child prostitution and pornography. If any foundation existed for such allegations, one would expect all of the children at the Snells to be in jeopardy. The order that was issued was consistent with the licensing investigation.

Sweptson, Sieck and Levingston are not entitled to absolute immunity.[18]

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[18]We recognize that this circuit has granted absolute immunity to probation officers who allegedly made false statements in a pretrial bond report and presentence report. Tripati v. United States INS, 784 F.2d 345, 347-48 (10th Cir. 1986) (per curiam), cert. denied, 484 U.S. 1028 (1988). And some courts have reached results in which both social workers involved in child protection and probation officers were accorded the same type of immunity, whether it be absolute or qualified. Hodorowski, 844 F.2d at 1214 (qualified immunity); Austin, 830 F.2d at 1361 (qualified immunity); Meyers, 812 F.2d at 1159 (absolute immunity); Myers v. Morris, 8310 F.2d 1437, 1466-67 (8th Cir.), cert. denied, 484 U.S. 828 (1987) (absolute immunity; private social worker). Our decision in Tripati is in no way inconsistent with the result reached here.

Absolute immunity for the probation officer in Tripati extended to the preparation of the pretrial bond or presentence report, not to every activity that a probation officer may undertake. 784 F.2d at 348. Tripati is in keeping with a functional approach to absolute immunity because the court requires pretrial bond and presentence reports in handing the criminal docket. Id. These functions of the probation officer are integrally related to the judicial function.

The cases relied upon in Tripati do not purport to establish a broader rule or suggest a different rule in this case. Hughes v. Chesser, 731 F.2d 1489, 1490 (11th Cir. 1984) (absolute immunity for preparation and submission of presentence report); Spaulding v. Nielsen, 599 F.2d 728, 729 & 729 n.2 (5th Cir. 1979) (same); Burkes v. Callion, 433 F.2d 318, 319 (9th Cir. 1970) cert. denied, 403 U.S. 908 (1971) (absolute immunity for probation officer preparing and submitting a probation report in a criminal case); see also Demoran v. Witt, 781 F.2d 155, 158 (9th Cir. 1985) (absolute immunity for preparation of presentence report). In contrast to the preparation of pretrial bond or presentence reports, other decisions involving the revocation of probation or parole by a probation or parole officer warrant only qualified, not absolute, immunity because such decisions are farther removed from the judicial process and are not initiated by courts. Griffin v. Leonard, 821 F.2d 1124, 1125 (5th Cir. 1987); Nelson v. Balzaic, 802 F.2d 1077, 1078-79 (9th Cir. 1986); Ray v. Pickett, 734 F.2d 370, 374 (9th Cir. 1984); Galvan v. Garmon, 710 F.2d 214, 215 (5th Cir. 1983), cert. denied, 466 U.S. 949 (1984). It is these latter cases that the courts in Hodorowski and Austin relied upon in determining that social workers involved in child protection were not entitled to absolute immunity. We also find these latter cases analogous to the situation presented in this case.

D.

The issue of absolute immunity is more difficult with respect to defendant Padley, the assistant general counsel of DHS who compiled the information and presented the application to Judge Brown. We note that the Second Circuit granted absolute immunity to a child protective services department attorney who initiated and prosecuted child protective orders. Walden v. Wishengrad, 745 F.2d 149, 152 (2d Cir. 1984). In that case, the attorney had taken steps to compel a witness to attend a hearing to terminate parental rights. Id. at 150.

In this case, the federal district court denied defendant Padley absolute immunity on two grounds: 1) she was acting in an investigative capacity, and 2) even if she was acting in a quasi-prosecutorial capacity, she ventured outside her duties to

perform a quasi-prosecutorial task. Snell, 698 F. Supp. at 1558. The district court relied heavily upon defendant Padley's admissions. Padley stated that "[t]he whole purpose of the application was to obtain the assistance of the [state] court to complete an investigation as to allegations." Rec. vol. III, doc. 114, ex. C at 172. Padley also was aware that normally such applications would be filed by the district attorney or attorney general's office; indeed she had never drafted an application of this type before. Id. at 169-71.

We would have no problem affirming the district court's decision concerning the investigative nature of some of defendant Padley's activities had the plaintiffs come forward with evidence indicating that defendant Padley only engaged in the "preliminary gathering of evidence that may

ripen into a potential prosecution." Gobel v. Maricopa County, 867 F.2d 1201, 1204 (9th Cir. 1989). For we have held that a prosecutor who interrogates a suspect in the first instance is fulfilling an investigative, rather than a prosecutorial, function. Rex v. Teeples, 753 F.2d 840, 844 (10th Cir.), cert. denied, 474 U.S. 967 (1985). Moreover, the Second Circuit in Robinson, 821 F.2d at 918-19, has held that an attorney who assists a police officer in investigating a child abuse complaint is merely part of the "preliminary investigative process," and is not entitled to absolute judicial immunity.

In this case, the rule concerning absolute immunity for prosecutorial functions and not for investigative or administrative functions is easier to state than apply. Although absolute immunity

applies to initiating and presenting a prosecution, the Supreme Court has recognized that some duties prior to the initiation of a prosecution are also protected. Imbler, 424 U.S. at 431 n.33. Preparing to initiate a prosecution may necessitate obtaining, reviewing and evaluating evidence; absolute immunity may attach when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court. See Id.; Grant v. Hollenbach, 870 F.2d 1135, 1138 (6th Cir. 1989) (decision of prosecutor to investigate a criminal charge entitled to absolute immunity); Gobel, 867 F.2d at 1204 (actions undertaken as part of the preparation of the prosecutor's case are absolutely immune, even if such actions could be characterized as "investigative" or "administrative"); Auriemma v. Montgomery, 860 F.2d 273, 278

(7th Cir. 1988) (extra-judicial investigation by government attorneys not entitled to absolute immunity); Marx v. Gumbinner, 855 F.2d 783, 792 (11th Cir. 1988) (prosecutor entitled to absolute immunity for investigation necessary to prepare case such as interviewing witnesses before presenting them to a grand jury or interviewing the victim of a crime).

We have held that a critical factor for absolute prosecutorial immunity "involves a prosecutor's acts as an advocate before a neutral magistrate." Lerwill v. Joslin, 712 F.2d 435, 437 (10th Cir. 1983). Thus, a prosecutor who participates in an illegal search, issues a libelous press release, assists with an unlawful sale of seized property or orders a warrantless arrest ordinarily will not be entitled to absolute immunity. Id. at 437. On the other hand,

a prosecutor who performs functions within the continuum of initiating and presenting a criminal case, such as filing charges, seeking an arrest warrant or advocating conditions of release, ordinarily will be entitled to absolute immunity. Id. at 439. "Although identifying those acts entitled to absolute immunity is not always easy, the determinative factor is 'advocacy' because that is the prosecutor's main function and the one most akin to his quasi-judicial role." Rex, 753 F.2d 843.

Here, some evidence indicates that Judge Brown told defendant Padley to prepare an application based, at least in part, upon earlier ex parte representations concerning the Snells that were made to the judge by detective Einhorn. Rec. vol. I, doc. 96, ex. 2 at 31-32 (Brown depo.); Id. vol. III, doc. 114, ex. C at 169 (Padley depo.). We

have found no summary judgment evidence indicating that Padley directed Einhorn to Judge Brown. Rather, it appears that Einhorn contacted the judge by telephone before defendant Padley was sought out by the judge. Rec. vol. I, doc. 96, ex. 2 at 30-31. The judge now says that he was willing to issue a detention order based on his conversation by Einhorn, but he did not have it prepared when Einhorn appeared in person an hour later. Id. at 31. When Einhorn appeared and the order was not prepared, Judge Brown requested that Padley coordinate the supporting information.

Thus, Padley appeared before a neutral judge at the judge's express suggestion; she was not acting unilaterally.[19] She was

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[19]For two reasons, defendant Padley is not entitled to absolute quasi-judicial immunity on a theory that she merely acted at the direction of judge Brown in preparing

directed to coordinate existing information, not pursue further investigation. Indeed, Judge Brown testified on deposition that he would have issued the order based upon the oral representations of Detective Einhorn. Rec. vol. I, doc. 96, ex. 2 at 62-63. However, that is not what happened. In the application she prepared, Padley matched the existing allegations with citations to the statutes concerning child abuse and neglect,

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the application. First, there is no evidence that Judge Brown ordered Padley to file the application containing the false allegations. See Turney v. O'Toole, 898 F.2d 1470, 1472-73 (10th Cir. 1990) (absolute quasi-judicial immunity applied to execution of judicial order of confinement); Valdez v. City & County of Denver, 878 F.2d 1285, 1288 (10th Cir. 1989) (officers arresting and confining plaintiff on judge's contempt order entitled to absolute quasi-judicial immunity). Second, defendant Padley's conduct involved more than a ministerial act pursuant to a judge's directive, see Valdez, 878 F.2d at 1289, rather her decision to prepare and file the application was a product of legal judgment.

deprived children, and licensing, and then she requested relief: that the court "provide whatever assistance . . . the Court deems appropriate in order to protect children and assist DHS in completing child abuse and licensing investigations of the Snell[] home." Id. ex. 4 at 2. Under current Rules of Professional Conduct, Padley might have an obligation to make a more complete presentation;[20] however,

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[20]Padley indicated that she did not know whether the allegations concerning the Snells contained in the application were true or false; the purpose of the investigation was to so determine. Rec. vol. III, doc. 114, ex. C at 273-74. Padley might have disclosed that the Snells were in no way sought as suspects by the F.B.I. Rule 3.3 of the Oklahoma Rules of Professional Conduct prohibits a lawyer from knowingly making " a false statement of fact or law to a tribunal." Okla. Stat. Ann. tit. 5, Ch. 1, app. 3-A (West Supp. 1990). Rule 3.3(d), now in effect, requires that a lawyer in a ex parte proceeding inform the court of all material facts necessary to make an informed decision, "whether or not the facts are adverse." Id.

that issue goes to the merits of Padley's conduct, not to its function. Thus, we characterize Padley's conduct in preparing and presenting the application before the judge as advocacy by an officer of the court, not police investigation. Any investigation done by defendant Padley was incident to her filing the application. Even viewed in the light most favorable to the plaintiffs, the summary judgment evidence simply does not show that defendant Padley originated or augmented the false information which was contained in the application for an order. Accordingly, we reject the district court's characterization of Padley's conduct as investigative which would deprive her of absolute immunity.

The district court held in the alternative that Padley would not be entitled to absolute immunity because she

"ventured outside her normal duties to perform a quasi-prosecutorial function." Snell, 698 F. Supp. at 1588. A judge may act in excess of his subject matter jurisdiction and still retain absolute judicial immunity; only in the unusual circumstances of complete and clear absence of all jurisdiction is absolute immunity inappropriate. Stump, 435 U.S. at 356-57. We have relied upon this analogous concept to discuss the contours of absolute prosecutorial immunity. Lerwill, 712 F.2d at 439. While a prosecutor might lose absolute immunity when he acts with a complete and clear absence of authority, such a condition does not occur when a prosecutor has an arguable basis of authority grounded in a statute. Id. at 440. In Lerwill, we determined that a part-time city attorney was entitled to absolute

immunity for initiating a prosecution based on state felony statutes, although he was only authorized to prosecute under city misdemeanor ordinances. Id. at 436. We held that

> a prosecutor who initiates a prosecution under statutes he is not authorized to invoke is immune from a section 1983 suit for damages when two conditions are satisfied: 1) the prosecutor is arguably empowered to prosecute the alleged conduct under some statute, and 2) the statute he incorrectly invokes also arguably applies to the criminal defendant's alleged conduct.

Id. at 440 (footnote omitted). Because both conditions were satisfied, absolute immunity applied.

The district court stated that "Oklahoma law and long established practice envisions that the District Attorney shall perform such [prosecutorial] acts on behalf of DHS." Snell, 698 F. Supp. at 1558. Given

the various allegations in this case, we find the matter slightly more complicated. Padley, as assistant general counsel of DHS, may represent the department in some matters given the statute empowering the DHS legal division. Okla. Stat. Ann. tit. 56, § 236 (West 1969); City of Sand Springs v. Department of Public Welfare, 608 P.2d 1139, 1150 (Okla. 1980).

With respect to proceedings concerning licensing under the Child Care Facilities Act, however, DHS is to be represented by the attorney general or the district attorney. Okla. Stat. Ann. tit. 10, § 408 (West 1987) (in legal proceedings, attorney general represents DHS), § 409 (when injunction is sought by DHS, suit is brought by the attorney general or district attorney); see also DHS Division of Child Welfare Services-Policy and Procedure-

Licensing §§ 667.23 (3/15/79), reproduced in rec. vol. III, doc. 114, ex. M (if owner or operator of child care facility continues to operate after adverse final decision on licensing, "the State Director may request the Attorney General or the appropriate District Attorney to secure a civil injunction or initiate criminal proceedings.").

The criminal statutes prohibiting child abuse and neglect, Okla. Stat. Ann., tit. 21, §§ 843 & 843.1 (West 1983 & Supp. 1990), are enforced by the district attorney, Id. tit. 19, § 215.4 (West 1988 & Supp. 1990). The district attorney and Juvenile Bureau have the authority to file a petition seeking an adjudication of an alleged deprived child. Okla. Stat. Ann. tit. 10, §§ 1103(B), 1204(a) (West 1987). Defendants contend that "[t]here is no statutorily

prescribed procedure for securing juvenile court orders prior to the filing of an adjudicatory petition under Oklahoma law, although the juvenile court clearly may issue such orders." Appellants' Reply Brief at 8 (citing Okla. Stat. Ann. tit. 10, §§1104(d), 1104.1 & 1107(B)(West 1987 & Supp. 1990)). Former assistant district attorney McNeese testified on deposition that the "policies and procedures regarding pick-ups changed" as the presiding judge of the juvenile division changed. Rec. supp. vol. II, doc. 115, ex. J at 12.

Based upon our review of the statutory scheme, we are inclined to agree that the procedure for obtaining a pick-up order was not entirely clear. However, at the time of the events in question, it is uncontroverted that normal procedure resulted in this. function being handled by the police or the

district attorney, not DHS. Rec. vol. II, ex. J at 11 (McNeese depo.). As noted previously, DHS policy envisions that other agencies will determine what steps should be taken when allegations of abuse and neglect cannot be fully investigated by DHS child welfare workers. In very unusual circumstances, such as when it would be impossible to contact the appropriate authorities (e.g., district attorney, Juvenile Bureau, police), DHS policy apparently allows an application directly to the district court for emergency placement. See DHS Child Welfare Services-Child Abuse/Preventive Services Procedures § 623.3 (10/1/84), reproduced in rec. vol. III, doc. 114, ex. I. However, there are no circumstances in this case which would justify DHS assuming this authority.

We need not decide the difficult issue of if and when DHS counsel has authority to apply directly to the court for emergency investigative assistance or custody, because DHS clearly lacked authority in this case. The record is uncontroverted that DHS repeatedly approached the district attorney's office to take action and that office exercised its prosecutorial discretion not to proceed. DHS even contacted the police, who refused to intervene without a court order. Defendant Padley had never prepared or filed such an application before, and she was unaware of any previous DHS precedent for such an application. Rec. vol. III, doc. 114, ex. C at 271-72. In these circumstances, we do not believe that the statutory schemes concerning licensing and alleged deprived children envision an end-run by DHS to

override the prosecutorial discretion exercised by the offices of the district attorney or even the attorney general. Granted, DHS has express authority to investigate licensing matters, Okla. Stat. Ann. tit 10, § 405 (West 1987), and the DHS is charged with investigating reports of child neglect and abuse, Id. tit. 21, §846(A) (West Supp. 1990). Even so, this general authority did not justify an end-run around the district attorney so as to take legal action.

Absolute immunity is "strong medicine" and government officials "who seek exemption from personal liability have the burden of showing that the exemption is justified by overriding considerations of public policy." Forrester, 484 U.S. at 224, 230. In this case, defendant Padley has not made that showing. The purpose of absolute

prosecutorial immunity would be ill-served by granting it in cases when the defendant acts without colorable authority. Moreover, the very attribute that absolute prosecutorial immunity is meant to protect--prosecutorial discretion--would not be served were we to grant absolute immunity here because defendant Padley's activities were an attempt to supersede the very prosecutorial discretion vested in the district attorney's office. We conclude that although defendant Padley was functioning as a prosecutor, she did so without color of authority in these circumstances and absolute immunity is not warranted.

III.

The issue of whether defendants Sweptson, Sieck, Levingston and Padley are entitled to qualified immunity remains. In

evaluating the defense of qualified immunity, we compare the "objective reasonableness" of the conduct complained of with the state of the law at the time of the alleged violation. Harlow, 457 U.S. at 818. "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. For plaintiffs to defeat a claim of qualified immunity, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Once a defendant raises the defense of qualified immunity, the plaintiffs must

"come forward with facts or allegations to show both that the defendant's alleged conduct violated the law and that law was clearly established when the alleged violation occurred." Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988). The defendant prevails unless such a showing is made on both elements;[21] however, even if the plaintiff makes such a showing, the defendant still may prevail if he can establish "extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." Harlow, 457 U.S. at 819.

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[21]If the plaintiff is unable to marshal evidence indicating that the conduct complained of violated the law as presently interpreted, it is unnecessary to consider whether the law was clearly established at the time such conduct occurred. McEvoy v. Shoemaker, 882 F.2d 463, 465 (10th Cir. 1989).

The qualified immunity standard serves to minimize interference with government officials performing discretionary governmental functions and "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley, 475 U.S. at 341. Qualified immunity is a legal, not a factual, issue which must be resolved in the first instance by the trial court. Pueblo, 847 F.2d at 646. On appeal, the issue is straightforward, even it its resolution often is not: Do the facts alleged by the plaintiffs support a violation of clearly established law of which a reasonable person would have known? Mitchell v. Forsyth, 472 U.S. at 528 n.9; Davis v. Scherer, 468 U.S. 183, 191 (1984). This is an objective legal inquiry, though fact-specific. Anderson, 483 U.S. at 641. We have recognized that

when a plaintiff can point to specific facts of defendant's improper motivation, qualified immunity may be inappropriate due to "a conflict sufficiently material to defendant['s] claim of immunity to require [him] to stand trial." DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 719 (10th Cir. 1988); Pueblo, 847 F.2d at 649-50; Wright v. Southern Ark. Regional Health Ctr., 800 F.2d 199, 203 (8th Cir. 1986) (cited in DeVargas).

As an initial matter, we note that several cases arising under a variety of constitutional theories have granted qualified immunity to those investigating claims of child abuse or neglect when there were circumstances which made it appear that the children were in danger and there was evidentiary support for such an assessment. See, e.g., Landstrom v. Illinois Dep't of

Children & Family Servs., 892 F.2d 670, 674-78 (7th Cir. 1990) (fourth and fourteenth amendment claims; complaint by child of soreness); Doe v. Hennepin, 858 F.2d 1325, 1329-30 (8th Cir. 1988) (fourteenth amendment claim for deprivation of liberty and property interest; informant alleged that father engaged in sexual abuse of child), cert. denied, 109 S. Ct. 3161 (1989); Hodorowski, 844 F.2d at 1217 (family integrity claim; anonymous report that father chased children in yard with chain; social workers saw bruises and were told of more bruises by children); Robinson, 821 F.2d at 921-22 (due process and excessive force; two schoolmates gave descriptions of ongoing sexual abuse by stepfather of one child, one schoolmate indicated the other child had been beaten, both children appeared to fear reprisal upon inquiry and

mother did not appear able to protect children); see also Duchesne v. Sugarman, 566 F.2d 817, 825-26 (2d Cir. 1977) (due process; emergency custody appropriate because mother in psychiatric ward and children left unattended). The case before us, however, lacks circumstances indicative of an emergency and there are claims of retaliatory motive which must be considered.

A.

In the claims brought under § 1983, plaintiffs rely upon the first, fourth, fifth and fourteenth amendments. Rec. vol. I, doc. 56 (amended complaint), doc. 38 at 2, doc. 130 at i (unnumbered). As we understand the plaintiffs' claims as refined by the record, see, e.g., rec. vol. I, doc. 130, they are: 1) interference with liberty and privacy interests based upon the foster care relationship with the seven children

removed from the home, 2) interference with a liberty interest in plaintiffs' good names which occurred with the dissemination of the false child prostitution and pornography allegations, 3) interference with a reasonable expectation of privacy which occurred when police and the DHS entered and searched plaintiffs' home without probable cause and a warrant, on the authority of an order procured with allegations known to be false, and 4) retaliation due to the Snells' outspoken nature and refusal to be intimidated by DHS pressure, see Id., doc. 63 ¶ 13 at 8; rec. supp. vol. II, doc. 150 at 11. As previously noted, we consider only a portion of the third issue as it relates to the denial of qualified immunity to the defendants. Concerning the third issue, we do not have occasion to decide whether a search of a private home without

a warrant or probable cause violates the fourth amendment. Courts have reached differing results concerning the difficult issue of the scope of the fourth amendment protection in the context of a child abuse investigation. Compare Daryl H. v. Coler, 801 F.2d 893, 901-02, 904, 907 (7th Cir. 1986) (on preliminary record, visual inspection of child's nude body for signs of child abuse does not require probable cause or a warrant, but state's procedures did not insure reasonableness in every case) with Good v. Dauphin County Social Servs., 891 F.2d 1087, 1094 (3rd Cir. 1989) (warrantless search of home to investigate alleged child abuse unconstitutional absent consent or exigent circumstances).

B.

The touchstone of the fourth amendment is reasonableness. What differentiates this

case from others in which qualified immunity has been granted on fourth amendment claims is that the plaintiffs have come forward with evidence indicating deliberate and willful conduct, specifically, that the defendants knew that any allegations concerning child sexual abuse and the Snells were false, yet they persisted in their attempts to intervene on that very basis. In a due process context, the Eighth Circuit has determined that defendant social workers investigating suspected child abuse were entitled to qualified immunity "unless evidence of malice or improper motives on the part of the defendants is proved." Doe, 858 F.2d at 1329; Id. at 1330 (Henley, J., concurring). The court relied upon Myers v. Morris, 810 F.2d at 1457-58, in which the court determined that various police officers investigating suspected child abuse

were entitled to qualified immunity based upon a claim of judicial deception. Essentially, the plaintiffs in Myers contended that the officers, in seeking arrest warrants, swearing to complaints and arresting the plaintiffs had deceived judicial officers who found probable cause. Id. at 1454.

The claim of judicial deception in Myers is similar to the claim in this case. The court in Myers was careful to explain that subjective bad faith of an officer will not defeat qualified immunity if the officer's conduct was objectively reasonable. Id. at 1457. But at some point, an officer's knowledge of false information may defeat a finding of objective reasonableness:

> Construed liberally, the allegations of judicial deception may state a claim that the

> deputies deliberately or recklessly incorporated known falsehoods into their reports, criminal complaints and warrant applications. If this claim were true, then the deputies' sworn representations as to the existence of probable cause would be perjury, or close to it, and perjury is not objectively reasonable conduct.

Id. For this theory to survive qualified immunity, a plaintiff must make a substantial showing of deliberate falsehood or reckless disregard for truth, such that would be needed to challenge the presumed validity of an affidavit supporting a search warrant under Franks v. Delaware, 438 U.S. 154, 171 (1978). Myers, 810 F.2d at 1457-58. Likewise, in a § 1983 claim for judicial deception there must be "a specific affirmative showing of dishonesty by the applicant," i.e., knowledge of a plaintiff's innocence or that a witness was lying. Id. Equally important, a plaintiff must

establish that, but for the dishonesty, the challenged action would not have occurred. See Franks, 438 U.S. at 171-72 ("[I]f when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required."); United States v. Pace, 808 F.2d 723, 728-29 (10th Cir. 1987), cert. denied, 482 U.S. 918 (1987).

As applied to this case, we think that the plaintiffs have demonstrated that the fourth amendment's prohibition against unreasonable searches and seizures is implicated in these circumstances. We need not decide the precise contours of the fourth amendment standard that would apply, however, because the conduct alleged in these cases would violate the most minimal

standard of which we can conceive, given that the defendants in this case proceeded on a basis of individualized suspicion. See New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985). The plaintiffs have come forward with specific evidence tending to show that the allegations of child abuse were fabricated and that the defendants knew that such allegations were untrue. Plaintiffs also have evidence which tends to show that, but for the allegations of child prostitution and pornography, Judge Brown's order would not have been entered. Allegations of criminal wrongdoing known to be false may not provide the sole basis for probable cause or a warrant. Franks, 438 U.S. at 168. Nor may they constitute a reasonable basis to suspect wrongdoing which might justify a warrantless search at its inception. See T.L.O., 469 U.S. at 341-42.

The evidence is sufficient to indicate that the defendants engaged in a deliberate course of conduct, complete with false information, designed to gain entry into the Snell home. Such information was essential to persuade the juvenile judge to issue the order which the defendants relied upon.

In deciding whether the law was clearly established at the time of the incident, there must be some factual correlation between then-existing law and the circumstances confronting the public official. Garcia v. Miera, 817 F.2d 650, 657 (10th Cir. 1987) (relying on People of Three Mile Island v. Nuclear Regulatory Comm'rs, 747 F.2d 139, 144-45 (3rd Cir. 1984)), cert. denied, 485 U.S. 959 (1988). "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate

subsequent legal developments, not could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful." Harlow, 457 U.S. at 818. However, in this circuit, precise factual correlation between the then-existing law and the case at-hand is not required, Eastwood v. Dep't of Corrections, 846 F.2d 627, 630 (10th Cir. 1988); thus, a then-existing case "on all fours" with the case at hand is not essential. Melton, 879 F.2d at 729 n.37. While government officials are not required to anticipate developments in the law, they are expected "'to relate established law to analogous factual settings,'" Eastwood, 846 F.2d at 630 (quoting Three Mile Island, 747 F.2d at 144), and "apply general, well developed legal principles." Three Mile Island, 747 F.2d at 144. This represents "a broad view

of what constitutes an established right of which a reasonable person would have known." Sourbeer v. Robinson, 791 F.2d 1094, 1103 (3rd Cir. 1986), cert. denied, 484 U.S. 1032 (1987).

Was the law clearly established in 1987 that an entry and search of a residence on the basis of known false allegations violated the fourth amendment's proscription against unreasonable searches and seizures? The text of the amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. am. IV. Regarding the probable cause requirement for a warrant, there is an "'obvious assumption . . . that there will

be a truthful showing.'" Franks, 438 U.S. at 164-165 (emphasis in original) (quoting United States v. Halsey, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966), aff'd, No. 31369 (2d Cir. Jun. 12, 1967)). In Franks, the Court explained:

> This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

438 U.S. at 165. Likewise, even assuming that the entry and search in this case need be judged only by a reasonableness standard, equally implicit in the concept of reasonableness is that the information on

which the social worker proceeds upon is not known to be false.

We proceed to consider the situation confronting the DHS and the information which defendants possessed. Anderson, 483 U.S. at 641. This case does not involve "[a]llegations of negligence or innocent mistake," which plainly would not be sufficient to impeach a probable cause or reasonableness determination. See Franks, 438 U.S. at 171. Rather, plaintiffs have made detailed allegations of "deliberate falsity or reckless disregard" concerning the child pornography and prostitution allegations which appear to be the sole reason behind the issuance of the pick-up order. See Franks, 438 U.S. at 171-72. The evidence indicates that nine DHS social workers had dealt with the Snells since 1981, there were several home visits, the

latest occurring in July 1987. That visit resulted in a favorable report, although the Snells would not disclose the identity of the children being cared for in the absence of more justification. DHS, for a purpose not entirely clear, sought information concerning the identity of the children. Even giving special consideration to the facts and circumstances confronting DHS, we are unable to fashion an erroneous, though justifiable, link between the need for the identity information and the procuring of a court order on known false allegations. Although developed in the warrant context, the principles of Franks apply to the information used in this case. We conclude that even in the context of a child abuse investigation, a reasonable public official would have known that using known false information to secure an order to justify

entry and search of a private home would violate the fourth amendment's proscription on unreasonable searches and seizures. As we discuss further, plaintiffs have presented "a genuine, material factual issue concerning whether the defendants' conduct violated that right." See Rozek v. Topolnicki, 865 F.2d 1154, 1157 (10th Cir. 1989).

C.

Defendants Sweptson, Sieck and Levingston contend that the district court erred in denying them qualified immunity because they "did not prepare, review, present, direct or encourage presentation of the application to Judge Brown." Appellants' Reply Brief at 12. For supervisory liability, plaintiffs must demonstrate an affirmative link between the supervisor's conduct and the constitutional deprivation;

liability based upon respondeat superior will not do. Rizzo v. Goode, 423 U.S. 362, 371 (1976); Kaiser v. Lief, 874 F.2d 732, 736 (10th Cir. 1989). Plaintiffs must show that a supervisory defendant, expressly or otherwise, authorized, supervised, or participated in conduct which caused the constitutional deprivation. D.T. by M.T. v. Independent School Dist., 894 F.2d 1176, 1187 (10th Cir.), cert. denied, 111 S. Ct. 213 (1990); Kaiser, 874 F.2d at 736; Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988); Kite v. Kelley, 546 F.2d 334, 337 (10th Cir. 1976). Concerning a defendant acting in a non-supervisory capacity, there must be cause in fact between the conduct complained of and the constitutional deprivation. See Wulf v. City of Wichita, 883 F.2d 842, 864 (10th Cir. 1989); Reimer v. Smith, 663 F.2d 1316, 1322 n.4 (5th Cir.

1982); Bennett v. Passic, 545 F.2d 1260, 1262-63 (10th Cir. 1976). But, as stated by the Seventh Circuit:

> For liability under section 1983, direct participation is not necessary. Any official who "causes" a citizen to be deprived of her constitutional rights can also be held liable. The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights.

Conner v. Reinhard, 847 F.2d 384, 396-97 (7th Cir.), cert. denied, 488 U.S. 856 (1988).

Applying these standards, sufficient evidence establishes a causal link between these defendants and the constitutional deprivation alleged.

1. In the nature of personal participation, defendant Sweptson signed an allegedly altered CWS-14A report

recommending prosecution of the Snells based upon sexual abuse. Defendant Sweptson met with Asbury and detective Einhorn on August 14, 1987 to discuss the investigation of the Snells. Detective Einhorn, at least initially, identified the source of the child prostitution and pornography allegations as defendant Sweptson, along with Asbury and defendant Levingston. Clark Snell testified on deposition that he was threatened with retaliation by defendant Sweptson when he complained about DHS. Defendant Padley indicated that she visited with defendant Sweptson, along with defendants Sieck and Levingston, immediately prior to preparing the application and delivering it to Judge Brown. Defendant Sweptson may have reviewed the order issued by Judge Brown with defendants Padley, Sieck and Levingston before it was enforced.

2. Defendants Sieck and Levingston were assigned to the investigation of the Snells which culminated in the entry and search of the Snell residence. FBI agent Treece met with Asbury and defendant Levingston prior to August 26, 1987, and indicated that this was the first time she had heard of the allegations of child prostitution and pornography. Asbury and defendant Levingston attempted to convince others to intervene based upon various theories. Defendant Sieck visited with Judge Brown on August 19 and informed him that the Snells might be moving (a baseless allegation) in an attempt to get the judge to intervene. The next day, defendant Sieck attempted to shop for a district attorney that would issue a removal order based upon an alleged violation of the guardianship statute. Defendant Sieck and Levingston

participated in the entry and search of the Snell residence, all the while not reporting the serious child prostitution and pornography allegations to Sharon Snell.

3. Finally, defendant Padley prepared the application knowing of an absence of circumstances which might justify bypassing the district attorney's office, which repeatedly had refused to prosecute the same allegations. Although defendant Padley indicated in the application that DHS had received allegations concerning child pornography and prostitution, there were no facts, regardless of whether those facts later were determined to be erroneous, to support such a statement at the time the application was prepared.[22]

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[22]Padley responded on deposition as follows:

IV.

Although the district court had serious doubt about the plaintiffs' conspiracy

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Mr. Sherwood: At this point, then, when you filed this pleading, your testimony will be when this case goes to trial that you did not have any idea whether those allegations were true or false?

Ms. Padley: That's correct.

Mr. Sherwood: You did not--then you would agree with me that, at that point, you had no reasonable basis to assume that these allegations were true?

Ms. Padley: We had no way to know.

Mr. Sherwood: You had no reasonable basis to know whether the allegations were true?

Ms. Padley: That's what the investigation would reveal, hopefully.

Rec. vol. III, doc. 114, ex. C at 273.

claim, Snell, 698 F. Supp. at 1563-65, we do not share the same hesitation at this stage. We recently discussed the parameters of a § 1983 conspiracy claim in Dixon v. City of Lawton, 898 F.2d 1443 (10th Cir. 1990), and indicated that "a conspiracy to deprive a plaintiff of a constitutional or federally protected right under color of state law" was actionable. We noted, however, that to prevail on such a claim, "a plaintiff must plead and prove not only a conspiracy, but also an actual deprivation of rights; pleading and proof of one without the other will be insufficient." Id. at 1449; Earle v. Benoit, 850 F.2d 836, 844-46 (1st Cir. 1988). In this case, plaintiffs argue forcefully for the preservation of their conspiracy claim because, "[p]rovided that there is an underlying constitutional deprivation, the conspiracy claim allows for

imputed liability; a plaintiff may be able to impose liability on one defendant for the actions of another performed in the course of the conspiracy." Dixon, 898 F.2d at 1449 n.6.

We have determined that the defendants are not entitled to qualified immunity on plaintiffs' fourth amendment claim concerning a search of the Snell home on the basis of known false information. Thus, plaintiffs are entitled to an opportunity to present this constitutional claim to a jury. Concerning whether there is sufficient evidence to find an agreement among these participants to deprive the plaintiffs of a constitutional right, the district court erroneously limited its focus to the date on which the application and resultant search of the home occurred, August 26, 1987. Given that the relationship between DHS and

the Snells was ongoing and there were repeated attempts to harass and gain entry into the Snell's home (e.g. August 19, 20, 24 and 26, 1987) we think that the district court's focus was too narrow. While a deprivation of a constitutional right is essential to proceed under a § 1983 conspiracy claim, proof of an agreement to deprive often will require examination of conduct occurring prior to the deprivation. Cameo Convalescent Ctr. v. Senn, 738 F.2d 836, 839-40 (7th Cir. 1984), cert. denied, 469 U.S. 1106 (1985) (court examined retaliatory conduct and events preceding). In this case, the plaintiffs have adduced sufficient evidence of a single objective by these defendants to retaliate against them which culminated in Judge Brown's order and the resultant search of their home. The fact that some of the participants might not

have forseen the exact nature of the deprivation is of no moment:

> A plaintiff seeking redress need not prove that each participant in a conspiracy knew the "exact limits of the illegal plan or the identity of all the participants therein." Hoffman-LaRoche. Inc. [v. Greenberg], 447 F.2d [872] at 875 [(7th Cir. 1971)]. An express agreement among all the conspirators is not a necessary element of a civil conspiracy. The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result. To demonstrate the existence of a conspiratorial agreement it simply must be shown that there was "a single plan, the essential nature and general scope of which [was] know to each person who is to be held responsible for its consequences." Id.

Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979), rev'd in part on other grounds, 446 U.S. 754 (1980); see also Cameo Convalescent Ctr., 738 F.2d at 841.

Frequently, a conspiracy must be proven with circumstantial evidence because "[r]arely . . . will there be direct evidence of an express agreement among all the conspirators to conspire." Bell v. City of Milwaukee, 746 F.2d 1205, 1260 (7th Cir. 1984).

Applying these standards, we think that the plaintiffs on summary judgment have adduced sufficient circumstantial evidence from which a trier of fact could conclude that these defendants and others reached an agreement to deprive the Snells of a constitutional right based upon the Snells' refusal to identify the children in their care and Clark Snell's complaints about DHS. Referrals to DHS concerning the Snells were singled out and grouped together for special treatment. Asbury indicated that she viewed the complaints made by the Snells as harassment. According to Clark Snell,

defendant Sweptson threatened him with arbitrary and capricious governmental action should he not cooperate.

Several DHS meetings occurred in which extraneous topics, such as Clark Snell's income and his appliance repair business, were discussed. And Asbury and defendants Sieck and Levingston made repeated attempts, be they ex parte communications with various judges or contacts with the police department, to create a climate ripe for intervention. Plaintiffs' evidence reflects a dogged determination born of concerted effort to take action against the Snells, whatever the means, knowing that the district attorney would not become involved because of a lack of evidence. Whether the plaintiffs can prove their allegations at trial given defendants' contrary evidence is

another matter, but that is left for a trial consistent with this opinion.

AFFIRMED AND REMANDED.

APPENDIX 2

ORDER
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
Filed November 2, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CLARK DAVENPORT SNELL, et al.,	)	
Plaintiffs,	)	
vs.	)	Case No. CIV-87-1812-P
CONLEY TUNNELL, et al.,	)	(Filed November 2, 1988)
Defendants.	)	ORDER

I. INTRODUCTION

Clark Snell is a former alcoholic and convicted felon who, along with his wife Sharon, has provided a home in recent years for dozens of children from the Oklahoma City area. The Snell home, aside from serving as the Snells' personal residence, serves children as a family foster home, group home and emergency shelter. Estimates of the number of children staying at the residence at any one time have varied from one dozen to three dozen. Residing at the

home at various times have been the natural children of Mrs. Snell, children adopted by the Snells, children under various forms of guardianships by the Snells, children in the process of being adopted by the Snells, and children abandoned by their natural parents and left with the Snells.

The home has unquestionably provided a valuable service to many of the children who have passed through the Snell home in recent years. The home has also been controversial. Prior to the initiation of this litigation, the Oklahoma Department of Human Services ("DHS") received numerous complaints concerning the Snell home, ranging from inadequate supervision, neglect, and improper licensing procedures to child abuse. It is also clear that certain DHS employees and certain Oklahoma City police officers have harbored

suspicions, though without any evidentiary basis whatsoever, that the Snells were involved in child pornography and child prostitution. Needless to say, the tensions between the Snells and certain DHS employees who have monitored the Snell home have been strained for some time.

This is a Section 1983 civil rights action, arising out of the removal of seven children by DHS employees and Oklahoma City police officers from the Snell home on August 26, 1987. On that date, DHS filed an Application with the Honorable Sidney Brown, Presiding Judge of the Juvenile Division of the District Court of Oklahoma County, leveling a number of allegations against the Snells.[1] Paragraph one of that Application

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[1]This Court previously dismissed Judge Brown as a defendant in this case on January 29, 1988. Order of February 3, 1988.

stated: "DHS has received allegations of neglect, lack of supervision, child prostitution and child pornography in the Snell's home in violation of 21 O.S. §§ 843-48." Defendants' Ex. "5", Ex Parte Order issued August 26, 1987. Paragraphs two through four of the Application alleged that DHS had information that the Snells were operating an unlicensed facility (paragraph 2); that DHS had been unable to complete the child abuse investigation due to lack of cooperation by the Snells (paragraph 3); that DHS was concerned for the welfare of the children in the Snell home and that the number and identity of the children in the Snell home were unknown (paragraph 4).

The Application requested Judge Brown to "provide whatever assistance and orders the Court deems appropriate in order to protect children and assist DHS in

completing child abuse and licensing investigations of the Snells home." Defendants' Ex. "4", Application filed Aug. 26, 1987. Judge Brown promptly issued an order which, among other things, ordered "any police officer or law enforcement agency . . . to take into custody all of the children at Clark and Sharon Snell's home at 8513 Tiffany, Oklahoma City, Oklahoma County, Oklahoma . . . if Clark and Sharon Snell and/or their agents are unable to produce valid Court Orders signed by a Judge pertaining to each child in their home." Defendants' Ex. "5", Ex Parte Order issued Aug. 26, 1987.

Pursuant to this Order, Oklahoma City Police Sgt. George Johnson, accompanied by defendants Sieck and Levingston, went to the Snell home at approximately 6:00 p.m. on August 26, 1987 and identified seven

children for whom the Snells had no such documentation. Officer Johnson, after consultation with the DHS employees, determined that the children for whom no documentation could be produced should be removed, and promptly supervised the removal of these children from the Snell home to the Oklahoma County Juvenile Shelter.

As discussed in more detail below, the circumstances surrounding the Application precipitating Judge Brown's order of August 26, 1987 were extraordinary to say the least. This was the first time DHS had ever filed an application of this character. State law and long established policies envision such matters being presented by DHS to the court through the District Attorney's Office. The District Attorney's Office, however, was openly hostile to DHS' requests to pursue the Snell matter because of the

lack of evidence. Likewise, another judge was contacted by DHS officials prior to presenting the Application to Judge Brown. The other judge also declined to take action. Finally, the Application was unusual in that it was totally baseless with respect to the child pornography and prostitution allegations.

At a hearing held in the Juvenile Division of the Oklahoma County District Court within one week of the events of August 26, DHS was unable to come forward with any evidence to support the child prostitution and pornography allegations. It now appears that the DHS official who prepared the Application, Pam Padley, got her information from an Oklahoma City Police Detective, J.M. Einhorn, who in turn claimed that he had been provided his information concerning the pornography and

prostitution allegations from defendants Asbury, Swepston, Sieck and Levingston, and an FBI agent, Leslie Treece. At any rate, no evidence has ever been produced to substantiate the pornography and prostitution allegations against the Snells.

This highly emotional and much publicized litigation has been long and tortuous, and has resulted in the filing of a summary judgment motion on behalf of all defendants. The briefs and exhibits associated with this motion are voluminous. The motion presents close and disturbing questions on the issues of absolute and qualified immunity of state officials involved in child protection and child welfare matters. This Order resolves the pending summary judgment motion as to all remaining defendants.

II. SUMMARY OF PROCEEDINGS

The Court held pretrial hearings on October 11, 13, and 24, 1988 relating to the pending motion for summary judgment and other pretrial matters.

At the hearing held on October 11, 1988, the Court granted summary judgment on behalf of defendant Conley Tunnell, Assistant Director for the Division of Children and Youth Services, and further dismissed plaintiffs' claim for injunctive relief against DHS. See Order of October 11, 1988. Plaintiffs had previously dismissed defendant Lissa Vernon. As a result, the only remaining defendants are five DHS employees: (1) Mary Asbury, District Supervisor for the Division of Children and Youth Services; (2) Michael Swepston, County/District Program Supervisor for the Division of Children and Youth

Services' Child Welfare Unit in Oklahoma County; (3) Pam Padley, DHS Assistant General Counsel; (4) Barbara Sieck, a Social Services Supervisor for the Division of Children and Youth Services' Child Welfare Unit, and (5) Benita Levingston, a Social Worker in the Division of Children and Youth Services' Child Welfare Unit.

On October 11, 1988, Ted Sherwood, guardian ad litem for the fifteen children plaintiffs who are not the natural or adopted children of the Snells, announced settlement on behalf of thirteen of those plaintiffs. As a result, the only remaining plaintiffs in this case are Clark and Sharon Snell, their five adopted children, and the two children formerly represented by Mr.

Sherwood.[2] None of the children removed from the Snell home on August 26, 1987 remain as plaintiffs.

The plaintiffs allege that defendants individually deprived them of constitutional rights guaranteed by the fourth, fifth and fourteenth amendments, and conspired to do so. Defendants deny the allegations of the plaintiffs, asserting that their conduct was in good faith, and raise the affirmative defenses of absolute and qualified immunity. Although findings and conclusions were announced by the Court at the October 11, October 13, and October 24, 1988 hearings on a number of pretrial matters, some further history of the proceedings will help place

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[2]With the consent of all parties, the Court permitted Mr. Sherwood to withdraw from representing these two children because they are in the process of being adopted by the Snells. These two children are now represented by counsel for the Snells.

the matter in context for purposes of this Order.

In reviewing the motion for summary judgment, the Court was mindful that caution is advised in pretrial dispositions of conspiracy allegations in civil rights actions. See Hammond v. Bales, 843 F.2d 1320, 1323 (10th Cir. 1988) (citing Fisher v. Shamburg, 624 F.2d 156, 162 (10th Cir. 1980). However, to survive a motion for summary judgment on a conspiracy claim, plaintiffs must show the existence of a conspiratorial agreement. Hammond v. Bales, 843 F.2d at 1324. In sifting through the briefs and exhibits, the Court experienced great difficulty discerning plaintiffs' conspiracy theory.

Accordingly, the Court issued an order on October 11, 1988, which cautioned plaintiffs that it would not be sufficient

to merely identify several possible suspects in the alleged deprivation of plaintiffs' civil rights, informed plaintiffs that it expected and required evidence proving the existence of the alleged agreement to violate plaintiffs' civil rights, and required plaintiffs to file a Supplemental Response Clarifying Plaintiffs' Conspiracy Theory, which was to provide the following:

> 1. Identify each member of the alleged conspiracy, including both parties and non-parties.
>
> 2. Specify the duration of the alleged conspiracy, giving the date it began and the date it ended.
>
> 3. As to each defendant who is a member of the alleged conspiracy, state when the defendant joined the alleged conspiracy and the words or conduct through which the defendant joined the alleged conspiracy.
>
> 4. As to each defendant who is a member of the alleged conspiracy, itemize the independent evidence (i.e. each defendant's own words or conduct) which establishes the defendant's participation in the alleged

> conspiracy, including evidentiary citations which establish that such evidence is admissible.

Order, Oct. 11, 1988.[3]

Plaintiffs filed a document attempting to comply with this Order on October 18,

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[3]At the outset of this case, plaintiffs filed a Section 1985 conspiracy count against the defendants, claiming their actions were racially motivated. See Plaintiffs' Amended Complaint at 11, ¶ 17. The claim was apparently based on the fact that all seven of the children removed from the Snell home on August 26, 1987, were Black. Ted Sherwood, who was appointed by the Court after the filing of the Complaint as guardian ad litem for these children, subsequently moved to dismiss the Section 1985 action with prejudice. Sherwood, after careful analysis of the case, candidly acknowledged the "weakness" of this claim at the time of the requested dismissal. His co-counsel, Allan DeVore, made a similar acknowledgement at oral argument on October 11, 1988. In truth, the charge was baseless. Even a cursory review of the summary judgment filings reveals the Section 1985 action to be totally without merit. Nevertheless, this scurrilous allegation was trumpeted in the press by plaintiffs, and it is this allegation which has fueled much of the emotionally explosive atmosphere which now surrounds the case.

1988.[4] Defendants filed a response on October 21, 1988. The final hearing on the summary judgment motion was held on Monday, October 24, 1988. For the reasons set forth below, defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART.

III. SUMMARY JUDGMENT STANDARDS

A. Summary Judgment in General

The facts presented to the court upon a motion for summary judgment must be construed in a light most favorable to the

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[4]Plaintiffs submission on October 18, 1989 did not comply with this Court's Order of October 11, 1988 in several respects. In direct violation of the Order, plaintiffs cited to numerous evidentiary materials not before the Court, failed to specify the independent evidence pertaining to each defendant, and failed to provide evidentiary citations to many items of questionable admissibility. See Order dated October 21, 1988, Transcript of October 24, 1988 hearing, and Defendants' Objection to Plaintiffs' Application to Supplement filed October 20, 1988.

nonmoving party. Board of Education v. Pico, 457 U.S. 853, 864 (1982); United States v. Diebold, Inc., 369 U.S. 654 (1962). If there can be but one reasonable conclusion as to the material facts, summary judgment is appropriate. Only genuine disputes over facts which might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Finally, the movant must show entitlement to judgment as a matter of law. Ellis v. El Paso Natural Gas Co., 754 F.2d 884, 885 (10th Cir. 1985); Fed. R. Civ. P. 56 (c).

Although the Court must view the facts and inferences to be drawn from the record in the light most favorable to the nonmoving party, even under this standard there are cases where the evidence is so weak that the

case does not raise a genuine issue of fact. Burnette v. Dow Chemical Co., 849 F.2d 1269, 1273 (10th Cir. 1988). As stated by the Supreme Court, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

The Supreme Court recently emphasized that, before granting summary judgment, the "requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. at 248 (emphasis in original). A dispute is "genuine" if a reasonable jury could return a verdict for the nonmoving party. Id. The Court stated

that the question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. "The mere existence of a scintilla of evidence in support of the [party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [party]." Id. at 252.

B. Qualified Immunity

In the recent case of Coen v. Runner, 854 F.2d 374 (10th Cir. 1988), the Tenth Circuit articulated the standard to be used in determining whether to grant summary judgment based on qualified immunity. In Coen, our circuit stated:

> Qualified immunity is an affirmative defense that protects government officials from personal liability unless their actions violate clearly

> established law of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Once the defense has been raised and the plaintiffs have met their burden of identifying both the clearly established law that the government official is alleged to have violated and the conduct that violated that law, the defendant must demonstrate that no material issues of fact remain as to whether his or her actions were objectively reasonable in light of the law and the information he or she possessed at the time. Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988). A defendant who makes such a showing of objective reasonableness is entitled to summary judgment unless the plaintiff can demonstrate that there are factual disputes relevant to the defendant's claim to immunity. DeVargas v. Mason & Hanger-Silas Co., 844 F.2d 714, 719 (10th Cir. 1988) (citing Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815 86 L.Ed.2d 411 (1985)).

Coen v. Runner, 954 F.2d at 377.

IV. FACTUAL ANALYSIS

The undisputed facts in this case were not easily ascertained. Aside from the fact that counsel have discovered few areas of common ground, plaintiffs' response to defendants' motion for summary judgment, filed July 29, 1988, was of little help in sorting out the facts.

Local Rule 14(B) specifically sets forth the requirements for responding to motions for summary judgment in this district. One purpose of Rule 14(B) is to assist the Court in identifying the undisputed facts in complicated cases such as this. Rule 14(B) provides, in pertinent part:

> The brief in opposition to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer

> with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

W.D. Okla. R. 14(B).

Plaintiffs' compliance with Local Rule 14(B) was mediocre at best. Rather than specifically controverting defendants' alleged undisputed facts, plaintiffs responded in shotgun fashion with a series of questions. For example, under plaintiffs' statement of "Material Issues of Fact About Which a Genuine Controversy Exists", plaintiffs' first "material fact", and citations to evidentiary material in support thereof, reads as follows:

> 1. Whether defendants had a good faith reasonable belief in the lawfulness of their conduct.
>
> (Federal statute PL 96-272 and Oklahoma Statutes, Exhibits and "H"; DHS procedures, Exhibit "I" §§ 621, 622.1, 622.2, 622.41; Depositions of Rebecca McNeese, Exhibit "J"; Leslie Treece, Exhibit "U" and Testimony of Detective Einhorn, Exhibit "O", all disputing defendants Fact #1) (Exhibits are included in the Appendix to this brief).

Plaintiffs' Revised Brief at 1.

Plaintiffs' Exhibit "O", cited above, is nine pages. Plaintiffs' Exhibit "J" is more than thirty pages. Plaintiffs' broad factual questions supported by general citations to lengthy evidentiary attachments fall well short of the particularity contemplated by Local Rule 14(B). In effect, plaintiffs have told the Court: "Here judge, you read all these materials and figure out the undisputed facts yourself." As a result, plaintiffs'

various summary judgment filings have delayed, rather than expedited, the issuance of this Order, and have not aided the Court in evaluating the facts in this case.[5]

While the Court could have deemed plaintiffs' entire summary judgment response a procedural default under Rule 14(B), the important and sensitive issues raised by

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[5]Plaintiffs' conspiracy theory was even more difficult to discern from the initial summary judgment filings. Plaintiffs' briefs repeatedly refer to "they" and "defendants" without any specificity. As a result, the Court ordered plaintiffs' to file a supplemental response clarifying plaintiffs' conspiracy theory. Order, Oct. 11, 1988. As an additional example of the poor work product submitted to the Court by plaintiffs, plaintiffs repeatedly referred in their summary judgment response to the affidavit of news reporter Marty Griffin in an effort to defeat defendant Conley Tunnell's motion for summary judgment. After hours of futilely combing the files in the Clerk's Office for this evidence, the Court learned at oral argument on October 11, 1988 that there was no such affidavit. This, among other things, precipitated Tunnell's dismissal. Order, Oct. 11, 1988.

this civil rights action have caused the Court to instead undertake its own analysis of the undisputed facts.

After carefully examining the evidentiary submissions of the parties at the summary judgment stage, the following is an analysis of the conduct of each of the remaining five defendants, based on the undisputed facts, and on the disputed facts when viewed in the light most favorable to the plaintiffs.

1. Clark and Sharon Snell were known to DHS long before the events occurred which led to plaintiffs' cause of action in this case. Plaintiffs' Ex. "P", Affidavit of Clark and Sharon Snell at 1-3; Plaintiffs' Ex. "1", Deposition of Mary Asbury at 140.

2. The Snells have complained to DHS and other governmental agencies on several occasions regarding DHS social workers.

Plaintiffs' Ex. "P", Affidavit of Clark and Sharon Snell at 3-4.

3. In February 1987, Sunbeam Family Services conducted an informal study of the Snell home. Its report concluded by stating that "we were very impressed with the Snell home and their ability to meet the needs of the children presently in their care." Plaintiffs' Ex. "Q", Sunbeam Family Services Report.

4. On April 1, 1987, Prins Anderson and Judy Collins, the Administrator, and Assistant Administrator of the DHS Licensing Unit, respectively, visited the Snell home. They determined that the Snells were not in violation of the Child Care Facilities Licensing Act. Plaintiffs' Ex. "S", Report of Prins Anderson.

5. On July 13, 1987, a referral concerning the Snell home was received by

DHS social worker, David McLain. Plaintiffs' Ex. "U", Child Abuse/Neglect Referral. The referral reported "environmental [neglect] and lack of supervision." Id.

6. McLain visited the Snell home in regard to this referral on July 13, 1987. Plaintiffs' Ex. "D", Deposition of Sharon Snell at 32-33.

7. Defendant Mary Asbury learned of the referral received by David McLain regarding the Snell home, on the day it was received, July 13, 1987. Plaintiffs' Ex. "1", Deposition of Asbury at 142, 145.

8. On July 13, 1987, or shortly thereafter, McLain filed a CWS 14-A report with the District Attorney's Office concerning the referral. Plaintiffs' Ex. "V", Report to District Attorney, July 13, 1987.

9. On July 14, 1987 the day following McLain's visit to the Snell home, defendant Asbury spoke with McLain about his CWS 14-A report. That report indicated the Snells would not identify the children, but the Snell home was nice and comfortable. Plaintiffs' Ex. "1", Deposition of Asbury at 149.

10. On or about July 14, 1987, Asbury told McLain that he should characterize his investigation as "uncertain" and close the case. Plaintiffs' Ex. "1", Deposition of Asbury at 150.

11. The CWS 14-A report was filed with the District Attorney's Office and reviewed by Assistant District Attorney Rebecca McNeese sometime during July, 1987. Plaintiffs' Ex. "J", Deposition of McNeese at 35. As the CWS 14-A report was designated as "for information only" McNeese

threw it away. Id. at 35. McNeese could not remember whether the report was a copy or the original, but normally such a report would be an original. Id. at 25, 35.

12. At McNeese's deposition on June 22, 1988, McNeese testified that the CWS 14-A report produced to plaintiffs during discovery (and included as Plaintiffs' Ex. "V") is not the report she received in July of 1987. Id. at 40-41. McNeese testified that the CWS 14-A report she reviewed in July 1987 contained allegations of child abuse, child pornography and child prostitution. Id. at 37-38. McNeese did not recall anything about licensing violations being included in the report. Id. at 38. These are both inconsistent with the CWS 14-A report produced by DHS which is Plaintiffs' Ex. "V". Additionally, McNeese noted other variations between the report

she reviewed in July 1987 and the report which was produced by plaintiffs during discovery and which is plaintiffs' Ex. "V". The CWS 14-A report which is Plaintiffs' Ex. "V" is dated July 23, 1987 and was signed not only by David McLain but also by Mike Swepston."

13. On or about July 20, 1988, Lissa Vernon, DHS Supervisor of Child Welfare Field Services for the Division of Children and Youth Services, called Asbury and informed her that Clark Snell had made complaints about Asbury to DHS. Plaintiffs' Supp. Ex. "A", Deposition of Vernon at 25.

14. Sometime during July, 1987, defendant Asbury prepared a memorandum to George Miller, Acting Deputy Director of

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"Plaintiffs allege that in November 1987 DHS sent another "original" copy of a CWS 14-A report.

Programs, dated July 23, 1987. The memorandum contained, among other things, the following information: (1) DHS had received complaints from parents and relatives that the Snells would not give up children and may have coerced parents' signatures by telling the parents they would be referred to child welfare and would never get their children back; (2) the Snells had been complaining to DHS; (3) DHS had received reports that the children at the Snell home were unsupervised and poorly cared for, and; (4) DHS had received phone calls from the Warr Acres police informing them that the Snells were known drug dealers. Plaintiffs' Ex. "I1", Memorandum from Asbury to George Miller, July 23, 1987.

15. In late July or early August, 1987, DHS received three referrals concerning the Snells. Defendants' Ex. "1", Affidavit of

Asbury at 1-2. One referral reported that seventeen (17) to twenty (20) children resided at the Snell home with inadequate supervision. Plaintiffs' Ex. "Z". The second referral concerned a mentally retarded boy, G.H., who had resided at the Snell home and had alleged that he had been kicked, and struck on the ears by Mr. Snell. Plaintiffs' Ex. "B1". The third referral asserted that the Snell home was dirty and the children were unsupervised. Plaintiffs' Ex. "A1".

16. Sometime in late July or early August, 1987, Asbury agreed with Vernon that DHS would not do anything further concerning the Snells until "we had the meeting" with state and regional DHS officials. Plaintiffs' Ex. "2", Deposition of Asbury at 176-77.

17. On August 10, 1987, Asbury assigned the three referrals on the Snells to defendant Barbara Sieck. Sieck later assigned them to defendant Benita Levingston. Plaintiffs' Ex. "4", Deposition of Asbury at 227; Defendants' Ex. Affidavit of Asbury at 3. Asbury asked Sieck to delay action on the referrals until Sieck received further direction. Defendants' Ex. "1", Affidavit of Asbury at 3. The three referrals, contrary to DHS policy, were not assigned a priority. See Plaintiffs' Ex. Supp. "F", Deposition of Sieck at 285-88; Plaintiffs' Ex. "2", Deposition of Asbury at 168-69, 176. Nor was the investigation of the referrals begun immediately as would be required by DHS policy had the referrals been determined to contain allegations which would place the children in imminent harm. Plaintiffs'

Supp. Ex. "F", Deposition of Sieck at 289, 293.

18. On August 12, 1987, defendant Padley, defendant Asbury, Lissa Vernon, DHS Supervisor of Child Welfare Field Services, Judy Collins, Assistant Administrator of the DHS Licensing Unit, and Prins Anderson, Administrator of the DHS Licensing Unit, met to discuss the Snell situation. Plaintiffs' Supp. Ex. "D", Deposition of Asbury at 207. Asbury had prepared a list of things to discuss at the meeting. The following matters were discussed at the meeting: (1) DHS had received complaints that there were large numbers of children coming in and out of the Snell home (id. at 205-207); (2) Jesus House' clients were told by the

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'Jesus House is a shelter for the homeless located in Oklahoma City, Oklahoma, where Clark and Sharon Snell formerly worked as volunteers.

Snells that if they did not place their children with the Snells, the Snells would call child welfare (id. at 208); (3) Clark Snell had a fraud conviction but denied having a criminal record in three home adoptive studies (4) Asbury believed that it was not possible that Clark Snell could be earning what he claimed from appliance repair (id. at 211); (5) Clark Snell's business phone number was listed only in the white pages of the phone directory (id. at 212); (6) Asbury believed that the organization DARE which was providing the Snells with rent money did not exist (this belief was erroneous and Asbury conducted only a limited investigation into this) (id. at 217-219); (7) the Snells would have parents sign a notarized statement giving the Snells temporary custody of the children, and Asbury believed it was

doubtful that legal guardianship ever occurred (id. at 221, 222); and (8) Clark Snell had refused to cooperate with McLain as to identifying the children in the Snell home. Id. at 223.

19. At the meeting between defendant Padley, defendant Asbury, Vernon, Collins and Anderson on August 12, 1987 the decision was made to refer the matter for police investigation and for Padley to contact Assistant District Attorney Rebecca McNeese for assistance. Plaintiffs' Supp. Ex. "D", Deposition of Asbury at 224.

20. The first contact that Detective J.M. Einhorn had concerning the Snells was with defendant Benita Levingston. Plaintiffs' Supp. Ex. "G", Deposition of Einhorn at 49.

21. On or about August 14, 1987, Detective Einhorn went to the DHS building

at the request of Levingston who had asked him to speak with defendants Swepston and Asbury. Plaintiffs' Supp. Ex. "G", Deposition of Einhorn at 49. When Einhorn arrived defendants Asbury, Swepston and Levingston were there. Id. at 50. A meeting ensued.

22. During the August 14 meeting referenced above, Swepston and Asbury related to Einhorn the following: (1) that somebody had called DHS and said that there were lots of children living in the Snell home and that the children were coming in and out at all hours of the night; (2) that there were also lots of adults coming in and out of the house at all hours of the night; and (3) that Clark Snell had failed to indicate in home adoptive studies that he had a previous criminal conviction. Plaintiffs' Supp. Ex. "G", Deposition of

Einhorn at 50-56. During this meeting Swepston, Asbury and Einhorn were at first concerned about licensing. The conversation then turned to "everything else" that might happen with a large number of people coming in and out of the house. Id. at 54-56. This appears to be the genesis of the pornography and prostitution suspicions.

23. At the August 14 meeting, referenced above, Einhorn told defendants Swepston and Asbury that a police investigation was warranted and told them not to do anything until they heard further from him. Plaintiffs' Ex. "6", Deposition of Asbury at 242.

24. On or about August 17, 1987, defendants Asbury and Levingston met with Special Agent Treece. Treece related to them that she needed to interview Clark Snell in connection with a complaint

initiated by Snell to a Las Vegas FBI agent about a man who had passed through Jesus House who allegedly was prostituting his sons. Later Snell would deny that he ever met this man. Asbury and Levingston clearly understood that there was no investigation of allegations that Snell was involved in child pornography or prostitution. Plaintiffs' Ex. "6", Deposition of Asbury at 243. Treece reviewed the information which DHS had concerning the Snells. Plaintiffs' Ex. "6", Deposition of Asbury at 243. Treece never suggested to any DHS employee that the Snells were under investigation for pornography or prostitution.

25. Sometime before August 26, 1987 defendant Levingston spoke with FBI Special Agent Leslie Treece. Levingston related to Treece that she was receiving complaints from the neighbors of the Snells about child

pornography and prostitution. This was the first Treece had heard of the possibility of child pornography or prostitution going on in the Snell home. Plaintiffs' Ex. "W", Deposition of Treece at 17-18. Levingston spoke with Agent Treece on several occasions. Each time they spoke it was about the complaints DHS had received concerning the Snells. Id. at 20. Levingston, in her Affidavit, has denied ever asserting that the Snells have engaged in child prostitution or child pornography. Defendants' Ex. "6", Affidavit of Levingston at 4.

26. On August 18 or 19, 1987, defendant Padley called Assistant District Attorney Rebecca McNeese. Padley told McNeese that she was going to ask McNeese for a favor concerning the Snells. McNeese cutoff the conversation at this point and it

went no further. Plaintiffs' Ex. "J", Deposition of McNeese at 29.

27. On or about August 19, 1987, defendant Mike Swepston had a conversation with Clark Snell. Snell had been attempting to set up a meeting with DHS officials at the state office. Plaintiffs' Ex. "E1", Deposition of Clark Snell at 12. During the conversation Swepston began talking about G.H., a mentally retarded boy who was the source of one of the Snell referrals. According to Snell, Swepston said: "You know anything could happen with that." Snell replied: "You know, we haven't done anything wrong." Swepston replied: "You don't have to do anything wrong out here. All we have to do is shuffle some papers around, and we can make anything fit." Id. at 14.

28. Early in the day on August 19, 1987 defendant Asbury instructed defendant

Levingston to go to the police station to talk with the police captain regarding a statute which provided that it was a misdemeanor to have guardianships of more than five unrelated people, and regarding the investigation concerning the Snells. Plaintiffs' Supp. Ex. "K", Deposition of Levingston at 53.

29. On August 19, 1987 defendant Levingston went to the police station and spoke personally with Captain Griffith. Levingston told Captain Griffith of the allegations of abuse and neglect against the Snells and of the statute relating to guardianship. Plaintiffs' Supp. Ex. "K", Deposition of Levingston at 56-57. Levingston told Griffith that she thought the statute meant that the Snell children should be removed. Id. at 58.

30. Later in the day on August 19, 1987 defendant Levingston, Hilde Lillegaard, of the DHS Licensing Unit, and defendant Sieck took the guardianship statute to the police station. Plaintiffs' Supp. Ex. "K", Deposition of Levingston at 53.

31. Following the meeting with Asbury on August 19, 1987, Lillegaard, Sieck and Levingston rode together to the police station. Plaintiffs' Ex. "C1", Deposition of Sieck at 145. When Levingston, Sieck and Lillegaard arrived at the police station, Griffith was not there so they talked to a sergeant on duty. Defendant Levingston told the sergeant that she had talked to Captain Griffith earlier in the day, and she was instructed to bring the guardianship statute, and the sergeant would accompany them to the Snells' home. Plaintiffs' Supp. Ex. "K", Deposition of Levingston at 55.

The sergeant, however, said that he would need a court order to pick up the children from the Snell home. Id. at 59.

32. On August 19, 1987, after Sieck, Levingston and Lillegaard had returned from the police station, Sieck spoke with Asbury. Sieck told Asbury that the shift had changed at the police station and the sergeant would not send anyone to the Snell home without a court order. Plaintiffs' Ex. "7", Deposition of Asbury at 264.

33. Defendant Asbury's next contact with Sieck or Levingston was around 6:30 or 7:30 p.m. on August 19, 1987. Asbury received a call from defendant Sieck (apparently the call was placed from the home of Snells' neighbor). Sieck told Asbury that they had encountered difficulty and asked for Judge Brown's telephone

number. Plaintiffs' Ex. "7", Deposition of Asbury at 264-65.

34. Sometime around that time, on August 19, 1987, defendant Asbury unsuccessfully attempted to call Judge Brown. Asbury also called and spoke briefly with Judge Major Wilson regarding the Snell matter. Judge Wilson told Asbury that he would rather talk to them in person regarding a pick-up order. Plaintiffs' Ex. "7", Deposition of Asbury at 264-66.

35. Also, on the evening of August 19, 1987, as noted above, Lillegaard, Sieck and Levingston visited the home of neighbors of the Snells. Defendant Levingston then called Judge Brown and talked to him for five to ten minutes. Levingston related to the Judge: (1) the existence of the referrals DHS had received about the Snells, (2) the existence of the guardianship

statute which provided that it was a misdemeanor to have guardianship of more than five unrelated children and, (3) her fear that the Snells were moving. Plaintiffs' Supp. Ex. "K", Deposition of Levingston at 77-79. Judge Brown told Levingston he would issue a pick-up order if they thought an emergency existed. Id. at 79-85. Defendant Levingston kept the Judge on hold for a moment while she consulted with defendant Sieck. Levingston told Sieck that Judge Brown had asked if there was an emergency. Defendant Sieck replied to Levingston that there was an emergency. However, it does not appear that Sieck's reply was communicated to Judge Brown. Id. at 80-81. Defendant Levingston told Judge Brown she would call him back if they needed a pick-up order. Id. at 83; see also

Plaintiffs' Supp. Ex. "J", Deposition of Brown at 21.

36. Levingston, Lillegaard and Sieck then decided to call Pam Padley. Plaintiffs' Supp. Ex. "K", Deposition of Levingston at 84. Defendant Levingston called defendant Padley and told her what they had done, and that the Judge was not familiar with the guardianship statute. Levingston asked Padley to interpret the statute and Padley replied that she did not understand the statute to authorize removal of the children. Id. at 84-85. Levingston then told Lillegaard and Sieck what Padley said. Id.

37. Defendant Asbury met with Levingston and Sieck back at the DHS office on the evening of August 19, 1987 after they had been to the home of Snells' neighbor.

Plaintiffs' Ex. "7", Deposition of Asbury at 266.

38. On or about August 20, 1987, Assistant District Attorney Sullins told Assistant District Attorney McNeese that he had been approached by defendant Sieck concerning picking up 19 or 20 children from a home. Sieck had shown Sullins the guardianship statute. Plaintiffs' Exhibit "J", Deposition of McNeese at 28.

39. On August 20, 1987 defendant Asbury spoke with defendant Padley. They discussed Padley's conversation with defendants Sieck and Levingston the previous night. Asbury and Padley tentatively planned to get together and discuss the issues in the Snell case. Plaintiffs' Ex. "7", Deposition of Asbury at 276.

40. On August 21, 1987 Asbury met with Padley. The two discussed what might

constitute a legal emergency which would justify picking up children. Plaintiffs' Ex. "7", Deposition of Asbury at 277.

41. On August 24, 1987, defendant Asbury met with defendant Levingston. Asbury told Levingston that she was concerned that the police did not appear to be doing anything. Plaintiffs' Ex. "7", Deposition of Asbury at 279.

42. On, or just prior to, August 24, 1987, Asbury gave Levingston a statute which contained the language "upon conviction"[8]

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[8] The statute which uses this language is apparently 10 Okla. Stat. § 410, under the Oklahoma Child Care Facilities Licensing Act, which provides:

> Any person or agent, representative, or officer of any child care facility who violates any of the provisions of this act shall, upon conviction, be deemed guilty of a misdemeanor and punished in accordance with the provisions of 21 O.S. 1961, § 10. Whenever, any agent,

and told Levingston it was relevant to the Snell case. Plaintiffs' Supp. Ex. "K", Deposition of Levingston at 107, 110, 111.

43. On, or just prior to, August 24, 1987, defendant Levingston called Einhorn and asked him to call Assistant District Attorney Deason and to ask Deason if the licensing statute that used the language "upon conviction" was relevant to the Snell case. Einhorn suggested to Levingston that she go to the District Attorney's Office and talk with an Assistant District Attorney named Mimi (Mary Smith) and show her the licensing statute. Plaintiffs' Supp. Ex. "K", Deposition of Levingston at 108.

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representative, or officer of any child care facility shall be convicted under authority of this act, such conviction shall be sufficient grounds for the revocation of the license of said licensee.

Levingston went to the District Attorney's Office and met the court liaison for DHS, Kathy O'Malley. Id. at 108, 109. Levingston and O'Malley went to talk to Assistant District Attorney Smith. When O'Malley became aware that Levingston was there about the Snells she said that they should not discuss the Snell situation because Assistant District Attorney McNeese would get mad. Id. at 108, 109.

44. Defendant Levingston left Smith's office and contacted Detective Einhorn. She told him what happened at the District Attorney's Office. Plaintiffs' Supp. Ex. "K", Deposition of Levingston at 111.

45. Sometime during this period of time, on or about August 24, 1987, defendant Levingston asked defendants Swepston and Sieck for permission to talk to Judge Brown and ask him for an interpretation of the

licensing statute which used the language "upon conviction". Defendants Swepston and Sieck agreed that this was fine. Plaintiffs' Supp. Ex. "K", Deposition of Levingston at 112-113.

46. On August 24, 1987 Levingston went to Judge Brown's office and asked him for an interpretation of the statute that used the language "upon conviction". Plaintiffs' Supp. Ex. "K" Deposition of Levingston at 107, 114-15. Judge Brown's "interpretation was that the 'upon conviction' did mean that it was a misdemeanor and that the parents could be arrested." Id. at 114-115. By this time it was late and Levingston went home for the day. Id. at 115.

47. On August 26, 1987 between 8:00 and 8:30 a.m. defendant Levingston called Detective Einhorn and told him the interpretation Judge Brown had given the

statute. Plaintiffs' Supp. Ex. "K", Deposition of Levingston at 117-118. Levingston suggested to Einhorn that he call Judge Brown to make sure Einhorn "understood the same thing that [Levingston] had understood." Id.

48. On August 26, 1987 between 9:00 and 9:30 a.m. Einhorn called defendant Levingston back, and said that Judge Brown was going to sign an order to pick up the children at the Snell home. Einhorn did not mention anything about child pornography or child prostitution during this conversation with Levingston. Plaintiffs' Supp. Ex. "K", Deposition of Levingston at 117-119.

49. Later that day on August 26, 1987, defendant Padley received a phone call from Einhorn requesting she file an application in the Juvenile Division of the District Court. Einhorn told her he had talked with

Judge Brown and Judge Brown said that he would issue an order to the police, but Brown wanted an application from DHS. Einhorn told Padley "when all this came out, that the department [DHS] would look real bad." Defendant Padley told Einhorn to talk to the District Attorney and she would do some checking internally. Plaintiffs' Ex. "C", Deposition of Padley at 157-58.

50. Following her conversation with Einhorn, still on August 26, 1987, Padley had phone conversations with people in child welfare in which she discussed the status of the Snell case. Plaintiffs' Ex. "C", Deposition of Padley at 158-59.

51. Sometime during the period these conversations were taking place on August 26, 1987, Padley received a telephone message that Judge Brown would like to speak with her. Plaintiffs' Ex. "C", Deposition

of Padley at 159. Padley returned the message and spoke with an employee in Judge Brown's office. The employee explained that Judge Brown was on the bench and would like to set an appointment. Id. at 160.

52. On August 26, 1987 defendant Padley spoke with Einhorn again and was told that he had spoken with Assistant District Attorney Mary Smith. According to Padley, Einhorn said that Mary Smith said that if the issue was in reference to the Snells that it was a DHS problem and that the District Attorney's Office was not going to get involved. Plaintiffs Ex. "C", Deposition of Padley at 159. During this conversation, Einhorn and Padley discussed Einhorn's contact with the Assistant District Attorney and Judge Brown. Padley told Einhorn that she was aware DHS had child abuse allegations concerning the Snell

household involving both neglect and abuse. Padley said she also knew the FBI had contacted DHS and indicated its interest in interviewing Mr. Snell in connection with a child prostitution and pornography investigation of another person, but that there were no allegations that the Snells were involved in child prostitution, pornography or trafficking of children. Id. at 160. Padley said she would see whether DHS would file an application. Id. at 161.

53. On August 26, 1987 Einhorn told Judge Brown that the reason he went to DHS was because defendants Asbury and Swepston were concerned about the number of kids in the Snell home, and complaints from neighbors concerning people going in and out of the home all day long. Plaintiffs' Supp. Ex. "G", Deposition of Einhorn at 42. Einhorn told Judge Brown that Levingston had

told him the Snells would not cooperate with a DHS worker who went to their home. Id. at 42. Einhorn also related to Judge Brown that Mr. Snell had a criminal record but had not indicated that fact on home adoptive studies. Id. at 41-42. Einhorn also told Judge Brown that Special Agent Treece had told him that she was investigating "a white male who was a known prostitute in regards to the Snells. . ." Id. at 39-40. All of Einhorn's information regarding the allegations of child pornography which he related to Judge Brown came from defendants Asbury, Levingston and Swepston. Plaintiffs' Ex. "O", Testimony of Einhorn Transcript of Proceedings before Judge Brown on August 27, 28 and 31, 1987 at 68, 71.

54. Sometime during the day on August 26, 1987 defendant Padley spoke with Judy Collins, an Assistant DHS Administrator.

Padley related to Collins that she had information from a police officer which indicated there may be abuse at the Snell home. Plaintiffs' Ex. "N", Deposition of Collins at 48. Padley and Collins also talked about licensing and the need to determine the identities of the children in the Snell home. Id. at 49. During this conversation Collins related to Padley that if it was a licensing issue then an additional meeting should be set up with the Snells. Id. at 50, 80. Collins further related that the Snells had been cooperative. Id.

55. On August 26, 1987, following her second conversation with Einhorn, Padley spoke with Judge Brown. Plaintiffs' Ex. "C", Deposition of Padley at 165. Judge Brown wanted her to file an application so he could enter an order to assist DHS in

completing its investigation of the Snells. Id. at 169. Padley told him it would be discussed within the Department. Id.

56. Later on August 26. 1987, Padley contacted defendants Levingston, Sieck, Swepston and an employee in licensing. Padley then prepared the Application. Plaintiffs' Ex. "C", Deposition of Padley at 187. Padley had no idea whether the allegations contained in the Application were true or false. Id. at 273. The Application filed by Padley was the only one of this type Padley knew of anyone in DHS preparing. Id. at 169-70.

57. The Application prepared by Padley asserted among other allegations, that DHS had received allegations of child prostitution and child pornography in the Snells' home. Defendants' Ex. "4", Application filed August 26, 1987, In the

Matter of Child Abuse and Licensing Investigations of the Clark and Sharon Snell Home by the Oklahoma Department of Human Services at ¶ 1.

58. On August 26, 1987 Padley went to Judge Brown's chambers and presented him with the Application. Padley indicated to Judge Brown that DHS was having problems completing the investigation. Plaintiffs' Ex. "C", Deposition of Padley at 187-188. The judge dictated the Order while Padley waited in his office. Id. at 188. 275. The pornography and prostitution allegations were the determinative factor in Judge Brown's decision to issue an order. According to Brown, it was the pornography/prostitution allegations which later led him to state: "I was concerned that I had been sort of sucked into a situation where -- for lack of better

terminology -- into issuing an order that had a lot of miscommunication." Plaintiffs' Ex. "D", Deposition of Judge Brown at 47-48.

59. Between 3:50 and 4:30 p.m. on August 26, 1987, Padley arrived at Levingston's office with the Order signed by Judge Brown. Defendants Levingston, Sieck, Padley and Swepston reviewed the Order. Defendants' Ex. "6", Affidavit of Levingston at 2.

60. On August 26, 1987 defendant Levingston called Special Agent Treece and invited her to go to the Snells that evening. Levingston told Treece they were going to request documentation of the children and pick up those children who had none. Plaintiffs' Ex. "W", Deposition of Treece at 24. Treece advised Levingston that there were no apparent federal

violations and declined the invitation. Id. at 25.

61. At approximately 5:00 p.m. on August 26, 1987 defendant Sieck, defendant Levingston, and Lillegaard arrived at the police station and presented Sergeant George Johnson with the Order signed by Judge Brown. Plaintiffs' Ex. "E", Affidavit of Sergeant Johnson at 1-2.

62. Sergeant Johnson, accompanied by officers Thomas Picchione and Rodney Hill and by defendant Sieck, defendant Levingston and Lillegaard arrived at the Snell residence around 5:30 or 6:00 p.m. on August 26. When they entered the Snell home Sergeant Johnson observed that the house was generally clean and noticed no obvious signs of child abuse or neglect. Id. at 2.

63. When Sharon Snell arrived home on August 26, 1987 defendant Levingston,

defendant Sieck, Lillegaard and the three police officers were already at the Snell home. Plaintiffs' Ex. "D", Deposition of Sharon Snell at 8, 13-14.

64. When Sharon Snell entered her home on August 26, 1987, defendant Levingston told Mrs. Snell that she wanted to talk to her. Plaintiffs' Ex. "D", Deposition of Sharon Snell at 9.

65. Defendant Levingston handed Mrs. Snell a list of allegations regarding the children including "non-supervision of bicycle riding and having been left at the neighbors for long periods of time." Plaintiffs' Ex. "D", Deposition of Sharon Snell at 14. Neither the DHS officials nor the police officers mentioned the child pornography or prostitution allegations. The Snells did not learn of the allegations of child prostitution and pornography until

the date of the hearing on August 27, 1987. Id. at 54-55.

66. Next Mrs. Snell went to the master bedroom and began making phone calls. Plaintiffs' Ex. "D", Deposition of Sharon Snell at 9-10. Mrs. Snell called a sympathetic DHS social worker, Eloise Harris, and was speaking with her on the phone. Defendant Levingston took the phone from Mrs. Snell and slammed it down. Id. at 10-11. Levingston told Mrs. Snell she could talk to Eloise at a later date. Id. Levingston said to Mrs. Snell, "If you don't talk to me, I will get the police in here and they will make you talk to me." Id.

67. Defendant Levingston told Mrs. Snell that she needed to produce paper work and if she did not cooperate, the police would force her to cooperate. Plaintiffs' Ex. "D", Deposition of Sharon Snell at 15.

68. Mrs. Snell went to the living room and retrieved the files the Snells had regarding the children. Plaintiffs' Ex. "D", Deposition of Sharon Snell at 16. Mrs. Snell began to produce the first document when defendant Sieck said: "That is not a legal document because it [is] rubber stamped." Id. Sieck, in the presence of Levingston, then said "[t]o load up the kids, this lady does not have any legal documents on these kids." Id. at 16-17.

69. Following this episode Mrs. Snell went to the bedroom and called her husband, and made several other phone calls. She then returned to the living room. Plaintiffs' Ex. "D", Deposition of Sharon Snell at 19-22. By this time the DHS employees and police officers had finished examining the documents and Sergeant Johnson identified seven children for whom no

documents were produced. Id. at 23; Plaintiffs' Ex. "E", Affidavit of Sergeant George Johnson at 4. Sergeant Johnson then discussed with defendants Sieck and Levingston the possibility of giving the Snells twenty-four (24) hours to produce documentation. Plaintiffs' Ex. "D", Deposition of Sharon Snell at 23-25; Plaintiffs' Ex. "E", Affidavit of Sergeant George Johnson at 4. Sergeant Johnson, after talking to defendants Sieck and Levingston, then made the decision to remove the seven children pursuant to the directive in Judge Brown's order. Plaintiffs' Ex. "D", Deposition of Sharon Snell at 33; Plaintiffs' Ex. "E", Affidavit of Sergeant George Johnson at 4.

70. Defendant Levingston asked about Patricia Turtle, an Indian child staying with the Snells. Defendant Sieck then made

the comment to a police officer that "no Indian tribe would ever leave a child in this home." Plaintiffs' Ex. "D", Deposition of Sharon Snell at 26.

71. One of the children, Shannon, ran up the stairs. Defendant Sieck went upstairs after him and, according to Mrs. Snell, pulled him by the arm down the stairs. Plaintiffs' Ex. "D", Deposition of Sharon Snell at 31-33.

72. The children were being taken out of the house and the question was asked whether there were any blankets for the children to protect them from the rain. According to Mrs. Snell, Levingston remarked: "Children of this culture are used to the elements." Id. at 35.

73. At approximately 7:30 p.m. the police officers and DHS employees left the Snell home and transported the seven

children to the Oklahoma County Juvenile Shelter. Plaintiffs' Ex. "E", Affidavit of Sergeant George Johnson at 5.

74. At the hearings on August 27, 28 and 31, DHS was unable to come forward with any evidence whatsoever to support the pornography or prostitution allegations contained in the August 26, 1987 Application. See Plaintiffs' Ex. "O", Transcript of Proceedings before Judge Brown, Aug. 27, 28 and 31, 1987.

V. DEFENDANTS' ABSOLUTE IMMUNITY DEFENSE

Defendants contend they are entitled to absolute immunity from liability for claims under Title 42 U.S.C. § 1983 because their conduct in the performance of child protective functions was adversarial in nature and intimately associated with the judicial phase of the juvenile court's jurisdiction. Brief in

Support of Summary Judgment of Defendants at 37.

There is no doubt that prosecutors are absolutely immune from Section 1983 civil rights liability in initiating a prosecution and in presenting the state's case. Imbler v. Pachtman, 424 U.S. 409, 432 (1976); Martinez v. Chavez, 574 F.2d 1043, 1044 (10th Cir. 1978) (per curiam); see also Briscoe v. La Hue, 460 U.S. 325, 345-46 (1983) (police who allegedly perjure themselves on witness stand can claim absolute immunity under Section 1983); Butz v. Economou, 438 U.S. 478, 515 (1978) (Department of Agriculture officials performing certain functions analogous to prosecutors can claim absolute immunity); Pierson v. Ray, 386 U.S. 547, 553.54 (1967) (Section 1983 does not abrogate absolute immunity of state judges); Bradley v.

Fisher, U.S. (13 Wall. 335) (1872) (federal judges have absolute immunity); Meade v. Grubbs, 841 F.2d 1512, 1532-33 & n.18 (10th Cir. 1988) (Commissioner of State Department of Health and Attorney General may claim absolute immunity with respect to declining to initiate criminal and civil proceedings).

Defendants argue that filing the Application containing allegations including child prostitution and child pornography, and pursuing the enforcement of the consequent Order were quasiprosecutorial acts eliciting absolute immunity.

The Court notes that the Tenth Circuit has not addressed this specific issue. Cf. Clulow v. Oklahoma, 700 F.2d 1291, 1298 (10th Cir. 1983) ("bar officials charged with the duties of investigating, drawing up, and presenting cases involving attorney discipline enjoy absolute immunity"). The

Court further notes that only the Ninth Circuit has squarely decided this issue and has ruled in favor of absolute immunity under limited circumstances. Myers v. Contra Costa County Dept. of Social Serv., 812 F.2d 1154, 1156 (9th Cir.) (social worker granted absolute immunity in initiating and pursuing child dependency proceedings against father; but not for actions prior to judicial intervention), cert. denied, __ U.S. ___, 108 S. Ct. 98 (1987); cf. Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984) (Social worker has absolute immunity for filing a negligence petition).

Two federal district courts in Oklahoma have found absolute immunity for social workers under circumstances different than those present in this case. Compare Snook v. Lunsford, No. 87-C550-B (N.D. Okla. May

24, 1988) (DHS employee granted absolute immunity for temporary custody action involving a mother leaving state and negligently entrusting six-year-old child to two minor siblings) with Guest v. Moore. No. CIV-85-1458-R (W.D. Okla. June 24, 1987) (DHS workers granted absolute immunity for failure to initiate a judicial hearing within the statutory time following an emergency detention of a suspected abused child) and Fan v. Gaston, No. 85-C-716-E (N.D. Okla. July 23, 1987) (juvenile court case worker granted absolute immunity for filing affidavit to obtain arrest warrant); see generally Annotation, Failure of State or Local Government Entity to Protect a Child Abuse Victim as Violation of Federal Constitutional Right, 79 A.L.R. Fed. 514 (1986 & Supp. 1987).

This Court believes that social workers and their supervisors who are investigating claims of child abuse are analogous to federal investigative agents and police officers who may claim only qualified immunity arising out of their investigative efforts. See, e.g., Martinez v. Winner, 771 F.2d 424, 442 & 444 (10th Cir. 1985). While the tasks of social workers who investigate child protection matters are clearly matters of compelling interest and importance to the public, how can it be said that when these investigators allegedly violate a citizen's constitutional rights they are entitled to absolute immunity, when highly trained FBI, DEA and Treasury agents facing identical allegations are entitled to only qualified immunity? This argument simply cannot stand. For this reason, the affirmative defense of absolute immunity of

defendants Asbury, Levingston, Swepston, and Sieck must be denied.

The only extensions of the carefully carved grants of absolute immunity have been for government employees who perform functions analogous to prosecutors. See e.g., Imbler v. Pachtman, 424 U.S. at 431-32 & n.33. The only employee with even a colorable role in the prosecutorial function would be defendant Padley, the DHS attorney who filed the August 26, 1987 Application. However, prosecutorial absolute immunity is limited, and the Tenth Circuit has held that "a prosecutor acting as an investigator has only qualified immunity." Rex v. Teeples, 753 F.2d 840, 843 (10th Cir.), cert. denied sub nom., 474 U.S. 967 (1985), quoted in Meade v. Grubbs, 841 F.2d at 1532; see Harlow v. Fitzgerald, 457 U.S. 800, 811 n.16 (1982); see also Annotation, When is

Prosecutor Entitled to Absolute Immunity from Civil Suit for Damages under 42 U.S.C. Sec. 1983: Post-Imbler Cases, 67 A.L.R. Fed. 640 (1984 & Supp. 1987).

The Court finds that the Application filed by defendant Padley was in furtherance of an investigation only, and therefore absolute immunity does not apply. See Rex v. Teeples, 753 F.2d at 843. Even if Padley's filing of the Application could be characterized as "prosecutorial" rather than "investigative", the Court would nevertheless decline to find absolute immunity for a DHS attorney who ventured outside her normal duties to perform a quasi-prosecutorial function. Significantly, the act by defendant Padley was completely unique, as she admitted she had never filed such an application before. Oklahoma law and long established practice

envisions that the District Attorney shall perform such acts on behalf of DHS. In this case, the District Attorney's Office was openly hostile to filing a petition or complaint against the Snells because of a lack of evidence. Immunity grounds are carefully drawn and are to be strictly construed. Padley is not entitled to absolute immunity. Accordingly, the Court holds that absolute immunity is DENIED as to all defendants.

VI. DEFENDANTS' QUALIFIED IMMUNITY DEFENSE

The question of whether defendants are entitled to qualified immunity is a legal issue to be decided by the Court. Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988). Once the affirmative defense has been raised, plaintiffs must come forward and

identify both the clearly established law that the government officials allegedly violated and the conduct which violated that law. Coen v. Runner, 854 F.2d 374, 377 (10th Cir. 1988). Only then must the government officials demonstrate that no material issues of fact remain as to whether their conduct was objectively reasonable in light of the law and information they possessed at the time. Id. Thus, before undertaking any analysis of the objective reasonableness of defendants' conduct, the Court must determine if plaintiffs have cleared the first hurdle by identifying clearly established constitutional rights that defendants allegedly violated. For the reasons set forth below, the Court finds that plaintiffs have failed in this regard with respect to several of their claims.

A. PLAINTIFFS' DUE PROCESS CLAIMS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, AND PRIVACY CLAIMS

1. The Parties' Contentions

In Counts V and VI plaintiffs allege that defendants deprived them of the protection of due process of law pursuant to the fifth and fourteenth amendments. In Count VIII plaintiffs allege that defendants injured plaintiffs' name and reputation and deprived plaintiffs of their right to privacy in their family relations. The Snells claim they had a constitutionally protected liberty interest in maintaining their relationship with the seven children who were removed from the Snells' home on August 26, 1987. The Snells claim they were acting in loco parentis to these seven children, and analogize their relationship to that of foster parents in which,

plaintiffs claim, there is a constitutionally protected liberty interest. Thus, plaintiffs claim the defendants were required to respect plaintiffs' liberty interest and to afford plaintiffs due process. See Plaintiffs' Objection to Defendants' Motion for Summary Judgment and Revised Brief at 31-35.

Defendants contend there was no relationship between the Snells and the seven removed children that warrants constitutional protection, and further contend that even foster parents have no constitutionally protected liberty interest in a foster family relationship. At the least, defendants claim, there is no clearly established right under the fifth or fourteenth amendments to due process relating to the removal of foster children from a foster home. See Brief in Support of

Motion for Summary Judgment of Defendants at 23-26.

2. Analysis

The rights of liberty and privacy that the Snells rely upon are not clearly spelled out in the constitution. They have been variously described as "penumbras" emanating from the Bill of Rights, "zones of privacy" implicit in the fourteenth amendment's concept of liberty, or as "the right to be let alone." Grusendorf v. City of Oklahoma City, 816 F.2d 539, 540-41 (10th Cir. 1987) (citations omitted).

These rights of liberty and privacy have been recognized only under limited circumstances. The Supreme Court has stated that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal liberty." Roe v.

Wade. 410 U.S. 113, 152 (1973) (citation omitted). The Supreme Court outlined the current reach of these interests "as embracing personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education." Grusendorf v. City of Oklahoma City, 816 F.2d at 541 (citing Carey v. Population Serv. Int'l., 431 U.S. 678, 685 (1977)).

Plaintiffs have unsuccessfully attempted to place themselves within the ambit of the recognized interests involving family relationships. The Snells admit their alleged liberty interest concerning their relationship with the seven removed children is not superior to or even coextensive with the liberty interest natural parents have with their children. Plaintiffs' Objection to Defendants' Motion for Summary Judgment and Revised Brief at

34. The Snells urge, however, that they are in a position similar to that of foster parents, and that the law is clearly established that foster parents have a constitutionally protected liberty interest in maintaining their relationships with foster children. As discussed below, the Court finds as a matter of law that the Snells do not have a constitutionally protected liberty or privacy interest in maintaining their relationship with the seven removed children.

The Supreme Court considered the issue of whether foster parents possess a constitutionally protected liberty interest in maintaining the foster family relation in Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) (hereinafter "OFFER"). In OFFER the Court noted two important distinctions between

foster family relationships and natural family relationships: (1) the source of the former is contractual in nature and is limited by the state through foster care agreements; and (2) there is virtually an unavoidable tension between protecting the liberty interest of natural parents while at the same time extending the rights of foster parents. Gibson v. Merced County Dept. of Human Resources, 799 F.2d 582, 586 (9th Cir. 1986) (citing OFFER, 431 U.S. at 845-46). The Supreme Court in OFFER found it unnecessary to decide whether foster parents have a protected liberty interest, since the Court based its decision on other grounds. OFFER, 431 U.S. at 847. Justice Stewart, however, in a concurring opinion, stated that he would squarely hold that foster parents' interests are not of a kind that the due process clause of the fourteenth

amendment protects. The state "confers no right on foster families to remain intact, defeasible only upon proof of specific acts or circumstances," nor does the state provide a "basis for a justifiable expectation on the part of foster families that their relationship will continue indefinitely." OFFER, 431 U.S. at 859-860.

The Fifth, Sixth, and Seventh Circuits have relied on OFFER to support holdings that foster parents do not possess a constitutionally protected liberty interest in the maintenance of the foster family relationship. Drummond v. Fulton County Dept. of Family and Children's Serv., 563 F.2d 1200, 1207 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978); Sherrard v. Owens, 644 F.2d 542, 543 (6th Cir.), cert. denied, 454 U.S. 828 (1981); Kyees v. County

Dept. of Public Welfare, 600 F.2d 693, 699 (7th Cir. 1979).

In the case cited by plaintiffs, Brown v. County of San Joaquin, 601 F. Supp. 653 (E.D. Cal. 1985), the district court relied on OFFER to reach the opposite result, concluding that foster family relationships are sufficiently similar to other familial relationships to be entitled to constitutional protection. Brown v. County of San Joaquin. 601 F. Supp. at 665. The district court in Brown v. County of Joaquin expressly rejected the holdings of the Fifth Circuit in Drummond and the Seventh Circuit in Kyees. Brown, 601 F. Supp. at 665.

Thus, if the law in this area is "clearly established," it would seem to be established in favor of defendants' position in the instant case. Moreover, if the law

in this area is not yet "clearly established", defendants still prevail because plaintiffs failed to clear the first hurdle in the qualified immunity analysis.

This Court follows the majority of jurisdictions which have held that foster parents do not possess a constitutionally protected liberty interest in the maintenance of a foster family relationship. Drummond v. Fulton County Dept. of Family & Children's Service, Sherrard v. Owens, Kyees v. County Dept. of Welfare. Plaintiffs have not established through the evidence presented that they are entitled to more protection than foster parents. If anything, the Snells' relationship with the seven removed children is even more attenuated than that of foster parents.

None of the seven removed children were the natural or adopted children of the Snells. Moreover, none of the remaining children plaintiffs in this case were among the seven children removed from the home on August 26, 1987. While the Snells clearly have a constitutionally protected liberty interest in maintaining their familial relationship with their natural and adopted children, a review of the Amended Complaint reveals that the only allegation regarding the children who were not removed is as follows:

> The children who remained at home were also made to experience the terror of seeing the other children removed in the fear and anticipation that they too would be snatched from the security of their home and family. Plaintiffs were forced to experience the removal against their will of children from their home, children whom they had sworn to protect and to nurture, but whom they were helpless to

> shield from harm. The only reason given by defendants for the abrupt, arbitrary and forced removal of the seven black children was that the custody papers signed by their mothers had not also been signed by a judge.

Amended Complaint at 7, ¶ 9.

The Court finds that the above allegation, assuming arguendo its truth, goes not to plaintiffs' liberty interest claims, but rather, if at all, to plaintiffs' fourth amendment claims discussed below, wherein plaintiffs allege that the reasonable expectation of privacy they had in their home was violated by defendants' conduct.

Accordingly, the Court finds as a matter of law that with regard to Counts V, VI and VIII, plaintiffs have failed to identify any clearly established constitutional rights which defendants

violated, and summary judgment is GRANTED in favor of all defendants on the due process and privacy claims.

B. PLAINTIFFS' FOURTH AMENDMENT CLAIMS

The plaintiffs, in Counts III and IV of their Amended Complaint, allege that defendants have deprived the Snells and the remaining seven children plaintiffs of their right to be secure in their house, papers and effects against unreasonable searches and seizures as provided by the fourth amendment.[9] Defendants contend they did not violate any clearly established particularized fourth amendment strictures. Brief in Support of Motion for Summary Judgment of Defendants at 20-23.

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[9]As indicated previously, the children who were "seized" or removed from the Snell home on the evening of August 26, 1987, are no longer plaintiffs, having announced settlement of their claims.

Defendants cite cases which indicate that "there is a substantial question whether warrantless home visits by social workers investigating claims of child abuse violate the Fourth Amendment." Donald M. v. Matava, 668 F. Supp. 703, 709 (D. Mass. 1987); see also Darryl H. v. Coler. 801 F.2d 893 (7th Cir. 1986). Brief in Support of Motion for Summary Judgment of Defendants at 21-23. Based on these cases, defendants argue that "it cannot follow that since social workers in this case accompanied police officers acting pursuant to a court order directing plaintiffs' cooperation with defendants' investigation, defendants should have known that their conduct violated the Fourth Amendment". Brief in Support of Motion for Summary Judgment of Defendants at 22. The problem with this analysis is that the Court Order

in question was procured through the presentation of false information to a judicial officer.

In the instant case, the plaintiffs, in an effort to meet their burden, have identified the law that the government officials are alleged to have violated as the fourth amendment right to be free from unreasonable searches and seizures and have argued that the entry into the plaintiffs' home on August 26, 1987 violated this law. It is undisputed that the plaintiffs have a reasonable expectation of privacy in their home, and that the Snells did not forfeit their fourth amendment protection merely by operating an emergency shelter home. The nature and extent of plaintiffs' fourth amendment protection, however, is the subject of much dispute between the parties.

At the outset, the Court rejects defendants' argument that the Order of Judge Brown, which authorized entry into the Snell home, relieves the defendants from potential liability. The alleged unreasonableness of the defendants' conduct is not lessened by the fact that Judge Brown issued an order authorizing entry. In Malley v. Briggs, 475 U.S. 335 (1986), the United States Supreme Court rejected the contention that the actions of a magistrate in issuing a warrant shielded a police officer from liability. Here, the reasonableness of the defendants' conduct must stand or fall on defendants' own actions because, viewing the evidence in the light most favorable to plaintiffs, Judge Brown's Order was issued based upon intentional or reckless misrepresentations generated by defendants Padley, Levingston, Sieck and Swepston. Indeed, a fair reading

of Judge Brown's testimony is that it was the child pornography and prostitution allegations which "sucked [him] into" issuing his August 26, 1987 Order. It might also be inferred that the pornography and prostitution allegations constituted evidence of an "emergency" invented by the defendants to get them over the hump of their previously unsuccessful efforts to obtain a pickup order for the children. See factual analysis finding No. 35 supra.

The parties agree that the "clearly established law" is grounded in the fourth amendment. The defendants, however, seem to argue (and thus, the plaintiffs have attempted to refute) that probable cause is not necessary to support an order authorizing entry into a home in a child abuse or child custody context. This law probably is not clearly established. See,

e.g., Donald M. v. Matava, 668 F. Supp. 703 (D. Mass. 1987).

This Court, however, should not reach the issue of what level of evidence is, or is not, necessary to support a finding of probable cause for the issuance of a warrant or order in a child abuse investigation. Likewise, this Court should not decide whether probable cause is the requisite standard for the issuance of a warrant or order in such an investigation.

Rather, the Court should focus its attention and issue its ruling based only upon the factual allegations that Judge Brown's Order was obtained through the use of false information. This sort of conduct -- intentionally providing false and misleading information to a judicial officer for the purpose of securing a warrant or order authorizing entry into a home --

violates the fourth amendment in any official investigative context. No court has ever declared otherwise.

The defendants do not contend, nor could they contend, that the child pornography and prostitution allegations contained in paragraph 1 of the August 26, 1987 DHS Application were true. Indeed, counsel for defendants at oral argument on October 24, 1988 candidly acknowledged that paragraph one of the Application was false. Moreover, defendant Padley, who prepared the Application, has testified that she had no idea whether the information set forth in the Application was true or false.

Counsel for defendants nevertheless suggested at the hearing on October 24, 1988 that there was insufficient evidence of intent to send the case to trial, urging that the false information presented to

Judge Brown was the result of "miscommunication", and was not the product of intentional unlawful conduct. While this may be true, it is, however, a well established maxim that the Court may not weigh evidence at the summary judgment stage. Moreover, issues of intent are rarely resolved at the summary judgment stage, especially in civil rights cases, where district judges are repeatedly warned by appellate courts to proceed with caution.

Here, viewing the evidence in the light most favorable to the plaintiffs, defendants Padley, Sieck, Levingston and Swepston embarked on a course of conduct on August 26, 1987 which involved the intentional presentation of false information to the Presiding Judge of the Juvenile Division of the District Court for the purpose of obtaining entry into the Snell home.

Moreover, the evidence before the Court at this time clearly suggests that the prostitution and pornography allegations were the determinative factor in obtaining the order from Judge Brown. Although it is now clear that the Snells were never the subject of such an investigation, Padley's Application nevertheless led Judge Brown to believe that such improprieties were occurring at the Snell's household. Moreover, the defendants involved in the events of August 26, 1987 arguably had every reason to believe that the alleged licensing violations did not afford a basis for seizure of the children, because DHS had previously (and unsuccessfully) sought to pick up the children on this ground.

As a direct result of the false information presented, defendants Levingston and Sieck obtained entry into the Snell home

after ordinary business hours and in the company of uniformed officers. Also, viewing the evidence under the standard outlined above, defendants' course of conduct was in direct conflict with a variety of standing DHS procedures, providing further arguable indicia of improper intent. Finally, DHS' complete failure to justify the allegations in paragraph one of the Application at the hearings held in the Juvenile Division of the District Court on August 27, 28 and 31, 1987 further underscores the inadequacy of defendants' fourth amendment qualified immunity defense at the summary judgment stage.

The defense of qualified immunity is grounded upon objective reasonableness. Here, if plaintiffs' evidence is believed, false allegations were presented to a judge

for the specific purpose of obtaining entry into the Snell home, such entry the defendants believed could not be accomplished without the presentation of the pornography and prostitution allegations to a judicial officer. The parties responsible for presenting these allegations were unable to substantiate them, not only at the state court hearings held after the August 26, 1987, search but even now. Regardless of whether the Court utilizes a probable cause standard or something less, official intrusions by social workers must comply with the reasonableness requirement of the fourth amendment. To place the label of "objective reasonableness" on the deliberate or reckless presentation of false information to a judicial officer for the purpose of obtaining entry into one's home defies reason, and would destroy the

protection provided by the fourth amendment.[10] The qualified immunity doctrine was never intended to shield such conduct or to grant DHS officials such sweeping powers.

In summary, the Court finds that a Section 1983 action can lie against social workers under the fourth amendment where false information is either deliberately or recklessly presented to a judicial officer for the purpose of obtaining entry into a home under the circumstances of this case. Plaintiffs have met the burden of

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[10] Malley v. Briggs, 475 U.S. 335 (1986); Franks v. Delaware, 438 U.S. 154 (1978); Franks v. Smith, 717 F.2d 183 (5th Cir. 1983); United States v. Strauss, 678 F.2d 886, 893 (10th Cir. 1982). Even administrative searches, for which probable cause is not required, necessitate a showing of reasonableness. Camara v. Municipal Court, 387 U.S. 523 (1967) ("reasonableness is still the ultimate standard"); Wyman v. James, 400 U.S. 309, 316-17 (1971).

identifying the clearly established law: the right under the fourth amendment to be secure in one's home from unreasonable searches and seizures premised on falsified information presented to judicial officers. The "unreasonableness" in this case is not evaluated by whether probable cause is required (or even whether it existed since the information from which to determine probable cause was allegedly false), but by whether the evidence provided to obtain the Order was true, or reasonably thought to be true or was knowingly and intentionally false or provided in reckless disregard of whether it was true or false. On this point, the Court finds there are substantial questions of fact which must be resolved by a jury.

Accordingly, the defendants who participated in the events of August 26,

1987 (Padley, Levingston, Sieck and Swepston) are not entitled to qualified immunity.[11] As set forth in more detail in the conspiracy discussion below, there is

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[11]Defendant Swepston did not participate personally in the "search" of the Snell home on August 26, 1987. Nevertheless, summary judgment on behalf of Swepston is denied because Swepston, viewing the evidence in the light most favorable to the plaintiffs (1) met with Padley, Levingston and Sieck on August 26, 1987 to discuss the filing of the Application with Judge Brown; (2) allegedly threatened Snell with retaliation for complaining about a breach of DHS confidentiality; (3) signed an allegedly altered report of David McLain which had previously been submitted to Assistant District Attorney McNeese; (4) allegedly provided Detective Einhorn with false information concerning the Snells' involvement with pornography; (5) was aware of the ongoing attempt by DHS to get the children out of the Snell home; and (6) met with defendants Levingston and Sieck to review Judge Brown's Order prior to the search on August 26, 1987. Swepston, as a supervisor who was allegedly aware of the false accusations which were being presented to Judge Brown, arguably "participated or acquiesced" in the constitutional deprivation alleged. Meade v. Grubbs, 841 F.2d 1512, 1528 (10th Cir. 1988).

no evidence defendant Asbury either directed, approved or agreed to the course of action undertaken by the other defendants on August 26, 1987 and accordingly, defendants' summary judgment motion is GRANTED on plaintiffs' fourth amendment claims as to defendant Asbury only.

C. PLAINTIFFS' CONSPIRACY THEORY

Plaintiffs contend that defendants conspired to deprive them of constitutionally protected rights in violation of Title 42 U.S.C. § 1983. Plaintiffs do not set out a specific count alleging a conspiracy in violation of Section 1983, and nowhere in their Amended Complaint are there any allegations of a conspiracy in violation of Section 1983. The only allegation of conspiracy in plaintiffs' Amended Complaint (other than Count II, paragraphs 16-17, alleging a

violation of Section 1985, which plaintiffs dismissed with prejudice on September 20, 1988) is contained in paragraph 13 and reads as follows:

> Plaintiffs allege on information and belief that the defendants DHS and DHS employees, conspired to discredit plaintiffs, used the alleged "investigation" as a ploy, and held the children hostage while they tried to unearth even a shred of evidence to support their spurious allegations.

Plaintiffs' Amended Complaint at 8, ¶ 13.

There is a serious question as to whether plaintiffs have properly preserved a Section 1983 conspiracy claim for trial. Plaintiffs filed an Amended Complaint on February 25, 1988, but did not amend their Complaint as it related to the alleged conspiracy. Amended Complaint, February 25, 1988, ¶ 13 and Count II. Plaintiffs did not amend or attempt to amend their Complaint on

or before June 1, 1988, the last day for amendment of pleadings under the Court's Scheduling Order of January 29, 1988. In plaintiffs' final contentions, general non-conspiratorial assertions of violations of fourth, fifth and fourteenth amendment rights were stated in terms similar to those of the Amended Complaint. Plaintiffs' Final Contentions, 1, 2, 21-23; Plaintiffs' Amended Complaint, Counts III-VI, pp. 12-13.

On July 20, 1988, plaintiffs filed their Objection to Defendants' Motion for Summary Judgment and Brief in Support (a Revised Brief was filed July 29, 1988). In their Objection, plaintiffs described this case as one in which "plaintiffs claim that defendants violated their rights under Articles [sic] I, IV, V and XIV of the Constitution of the United States." The defendants contend after review of the

pleadings to date that plaintiffs abandoned their conspiracy claim. Defendants' Brief In Reply to Plaintiffs' Objection to Defendants' Motion for Summary Judgment at pp. 1-2. Plaintiffs, however, resurrected their conspiracy theory again in supplemental filings to the summary judgment motions.

In the Final Pretrial Order in this case, submitted October 4, 1988, plaintiffs again refer to a "conspiracy to discredit Clark and Sharon Snell", Final Pretrial Order at p. 2, and contend that "[d]efendants met in one or more groups and conspired together to put pressure on the Snells to submit to the control of DHS." Final Pretrial Order at p. 21. Plaintiffs added the general conclusion that the defendants "conspired to violate the plaintiffs' constitutional rights." Id.

Plaintiffs did not identify their conspiracy claim with any specific constitutional claim or with any specific constitutional right and made no reference to the first or fourth amendments in their final contentions.

On October 11, 1988, the Court issued an Order directing plaintiffs to file a supplemental response clarifying plaintiffs' conspiracy theory. As indicated earlier, the plaintiffs' submission on October 18, 1988 did little to clarify the conspiracy theory. The plaintiffs' October 18, 1988 filing could arguably be interpreted to claim a conspiracy to discredit the Snells, as well as a conspiracy to violate plaintiffs' first and fourth amendment rights. But for the abundance of case law which urges caution in the dismissal of civil rights conspiracy claims, the Court would not hesitate to dismiss this claim of

plaintiffs, which can only be described as a "moving target".

At oral argument on October 11, and October 24, 1988 plaintiffs' counsel again described the Section 1983 allegation as a "conspiracy to discredit plaintiffs." This case, however, is not a state defamation lawsuit. To the contrary, it is a Section 1983 action alleging deprivation of clearly established constitutional rights. Plaintiffs have totally failed to persuade the Court that their alleged "conspiracy to discredit" is a viable civil rights action under Section 1983. If a legitimate conspiracy count can be inferred from the broad language in plaintiffs' Amended Complaint, the only such right arguably established by plaintiffs involves their fourth amendment claims.

To survive a motion for summary judgment on a conspiracy allegation, plaintiffs must show the existence of a conspiratorial agreement among the various defendants. Hammond v. Bales, 843 F.2d 1320, 1324 (10th Cir. 1988). Viewing the evidence in the light most favorable to the plaintiffs, their fourth amendment conspiracy claim in this case can only go forward against defendants Padley, Levingston, Swepston and Sieck. These are the only remaining defendants who either participated or acquiesced in the events of August 26, 1987, the date of the alleged fourth amendment violation. As set forth below, however, plaintiffs have failed to demonstrate a triable issue on their fourth amendment claims as to defendant Asbury.

Defendant Asbury, in her motion for summary judgment, came forward with

affirmative evidence that she was not involved in the events of August 26, 1987, nor was she even aware that an Application was going to be filed with the Court by DHS until well after the removal of the children from the Snell home. Plaintiffs have come forward with no evidence rebutting these allegations or establishing in any way Asbury's personal participation in the events of August 26, 1987. Instead, viewing the evidence in the light most favorable to the plaintiffs, plaintiffs have established that Asbury was clearly exploring a variety of possible avenues of intervention by DHS, and that she assisted in creating an atmosphere of rumor and innuendo that ultimately found its way into paragraph one of the DHS' August 26, 1987 Application to Judge Brown.

However, there is no showing that Asbury participated in obtaining the August 26, 1987 Order from Judge Brown, or that she agreed with anyone to pursue the course of action undertaken by the other defendants on August 26, 1987. Asbury did not direct Einhorn to talk to Judge Brown on August 26, 1987 nor did Asbury direct anyone to submit an Application to the Court. Moreover, contrary to plaintiffs' suggestions, there is no doctrine of respondeat-superior in civil rights cases. Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988). The plaintiffs' contention that defendants Asbury and Tunnell "quarterbacked" the events of August 26, 1987 is transparent speculation.

During the hearing on October 24, 1988 plaintiffs' counsel made reference to the "Briggs case" for the proposition that

defendant Asbury had a duty to act to prevent misconduct on the part of DHS employees under her supervision, thus arguing that even though Asbury didn't participate in the events of August 26, 1987, supervisory liability should be imposed upon her for failing to prevent those events. The Court's review of the Briggs case, Malley v. Briggs, 475 U.S. 335 (1986), aff'g 748 F.2d 715 (1st Cir. 1984), reveals that it does not address the issue of supervisory liability. Rather, it addresses absolute and qualified immunity.

Plaintiffs' attorney may have meant to refer to the "Grubbs case" instead of "the Briggs case". Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988) does address supervisory liability. Id. at 1527-28. Meade held that to be liable under Section 1983, a supervisor must have "participated

or acquiesced in the constitutional deprivations" alleged. Id. at 1528. Here, there is unrefuted evidence that Asbury neither participated in nor acquiesced in the events of August 26, 1987. the date of the alleged fourth amendment violation. Meade also held that a supervisor may be liable "where there is essentially a complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable." Id. Here, there is not even an allegation that Asbury had a duty to train the other defendants, much less that she failed to adequately train them.

Finally, Meade held that "unless a supervisor has established or utilized an unconstitutional policy or custom [which is not alleged in the instant case], a plaintiff must show that the supervisory

defendant breached a duty imposed by state or local law which caused the [alleged] constitutional violation." Id. Here, plaintiffs have made no showing Asbury violated any state or local law that any reasonable jury could find "caused" the events of August 26, 1987.

Asbury's pre-August 26, 1987 conduct, while arguably unprofessional, cannot be said to be in violation of any clearly established constitutional rights of plaintiffs. Nor did Asbury participate in the alleged fourth amendment violation. Absent an evidentiary showing from which Asbury's conspiratorial agreement in the allegedly unlawful search of August 26, 1987 can be inferred, summary judgment is mandated. Hammond v. Bales, 843 F.2d at 1324. Accordingly, defendant Asbury's

motion for summary judgment as to plaintiffs' conspiracy claim is GRANTED.

On the other hand, the same evidence which supports the denial of defendants Padley, Levingston, Swepston. and Sieck's motion for summary judgment on plaintiffs' fourth amendment claim, also supports an inference that these defendants undertook this course of conduct in furtherance of an agreement to violate plaintiffs' clearly established fourth amendment rights. Accordingly, defendants' motion for summary judgment on the plaintiffs' fourth amendment conspiracy claim is DENIED as to defendants Padley, Levingston, Swepston and Sieck.

VII. CONCLUSION

For the above stated reasons, defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART. Absent a stay of this matter, jury selection on the

remaining fourth amendment claim and conspiracy claim against defendants Padley, Swepston, Sieck, and Levingston will begin November 2, 1988 at 9:00 o'clock a.m.

IT IS SO ORDERED THIS 2ND DAY OF NOVEMBER, 1988.

/s/ Layn R. Phillips
Layn R. Phillips
United States District Judge

APPENDIX 3

OKLAHOMA STATUTES 1987 SUPPLEMENT
TITLE 21. CRIMES AND PUNISHMENTS
CHAPTER 30. MISCELLANEOUS OFFENSES
AGAINST THE PERSON
RIGHT OF PRIVACY

APP. 3

OKLAHOMA STATUTES 1987 SUPPLEMENT
TITLE 21. CRIMES AND PUNISHMENTS
CHAPTER 30. MISCELLANEOUS OFFENSES
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§ 845. Public policy - Protection of child - Definitions.

A. It is the policy of this state to provide for the protection of children who have had physical injury inflicted upon them and who, in the absence of appropriate reports concerning their condition and circumstances, may be further threatened by the conduct of those responsible for their care and protection.

B. As used in Section 846 through 848 of this title:

1. "Abuse and neglect" means harm or threatened harm to a child's health or welfare by a person responsible for the child's health or welfare. Harm or threatened harm to a child's health or

welfare can occur through: Nonaccidental physical or mental injury; sexual abuse, as defined by state law; sexual exploitation or negligent treatment or maltreatment, including the failure to provide adequate food, clothing, shelter, or medical care except as provided for in Section 846 of this title;

2. "Child" means a person under the age of eighteen (18) years. A person responsible for child's health or welfare includes the child's parent, guardian, or other person responsible for the child's health or welfare, whether in the same home as the child, a relative's home, a foster care home, or a residential institution;

3. "Sexual abuse" includes rape, incest and lewd or indecent acts or proposals, as defined by law, by a person responsible for the child's welfare; and

4. "Sexual exploitation" includes allowing, permitting, or encouraging a child to engage in prostitution, as defined by law, by a person responsible for the child's welfare or allowing, permitting, encouraging, or engaging in the lewd, obscene, or pornographic photographing, filming, or depicting of a child in those acts as defined by the state law, by a person responsible for the child's welfare.

§ 846. Mandatory reporting of physical abuse or birth of chemically-dependent child-Investigations-Spiritual treatment exemption-Appointment of attorney for child.

A. Every physician or surgeon, including doctors of medicine and dentistry, licensed osteopathic physicians, residents and interns, examining, attending or treating a child under the age of eighteen (18) years and every registered nurse

examining, attending or treating such a child in the absence of a physician or surgeon, every teacher of any child under the age of eighteen (18) years, and every other person having reason to believe that child under the age of eighteen (18) years has had physical injury or injuries inflicted upon him or her by other than accidental means where the injury appears to have been caused as a result of physical abuse or neglect, shall report the matter promptly to the county office of the Department of Human Services in the county wherein the suspected injury occurred. Every physician or surgeon, including doctors of medicine, licensed osteopathic physicians, residents and interns, or any other health care professional attending the birth of a child who appears to be a child born in a condition of dependence on a

controlled dangerous substance shall promptly report the matter to the county office of the Department of Human Services in the county in which such birth occurred. Provided it shall be a misdemeanor for any person to knowingly and willfully fail to promptly report any incident as provided above. If the report is not made in writing in the first instance, it shall be reduced to writing by the maker thereof as soon as may be after it is initially made by telephone or otherwise and shall contain the names and addresses of the child and his or her parents or other persons responsible for his or her care, the child's age, the nature and extent of the child's injuries, including any evidence of previous injuries, the nature and extent of the child's dependence on a controlled dangerous substance and any other information that the

maker of the report believes might be helpful in establishing the cause of the injuries and the identity of the person or persons responsible therefor if such information or any part thereof is known to the person making the report.

The county office receiving any report as herein provided shall investigate said report in accordance with priority guidelines established by the department of Human Services and if the county office finds evidence of abuse and neglect forward its findings to the district attorney's office in the county wherein the suspected injury occurred together with its recommendation as to disposition. In addition, a copy of the findings shall be sent to the Child Welfare Division of the Department of Human Services which shall be responsible for maintaining a permanent

central registry, suitably cross-indexed, of all such reported findings. Any information contained in the central registry shall be available to any county office and to any district attorney's office or public law enforcement agency investigating a report of suspected child abuse or neglect. The Department of Human Services may promulgate rules and regulations in furtherance of the provisions of this section.

All records concerning child abuse shall be confidential and shall be open to inspection only to persons duly authorized by the state or United States in connection with the performance of their official duties. It shall be unlawful and a misdemeanor for the Commission, or any employee working under the direction of the Department of Human Services, any other public officer or employee, or any court-

appointed special advocate to furnish or permit to be taken off of the records any information therein contained for commercial, political or any other unauthorized purpose.

No provision of this section shall be construed to mean that a child has been abused or neglected because said child's parent, guardian or custodian in good faith selects and depends upon spiritual means or prayer for the treatment or cure of disease or remedial care of such child.

APPENDIX 4

OKLAHOMA STATUTES 1987 SUPPLEMENT
TITLE 10. CHILDREN
CHAPTER 51. DELINQUENT, DEPENDENT AND NEGLECTED CHILDREN
ARTICLE I. DEPENDENT AND DELINQUENT CHILDREN

OKLAHOMA STATUTES 1987 SUPPLEMENT
TITLE 10. CHILDREN
CHAPTER 51. DELINQUENT, DEPENDENT AND NEGLECTED CHILDREN
ARTICLE I. DEPENDENT AND DELINQUENT CHILDREN

§1104.1. Filing petition when child in custody-Time-Hearing-Order to remove child from home

A. Where a child has been taken into custody under any provision of the Juvenile Code before a petition has been filed, a petition shall be filed and a summons issued within five (5) judicial days from the date of such assumption of custody, or custody of the child shall be relinquished to his parent, guardian or other legal custodian, unless otherwise provided for herein.

B. Where a child has been taken into custody and upon allegations of cruelty on the part of the parents, guardian or other person having custodial care of the child, the five-day limitation herein shall not cause the child to be relinquished to such

parent, guardian or other legal custodian. In all such cases, the court shall determine whether the petition was filed within a reasonable time, except that a petition shall be filed within thirty (30) days of the child being taken into custody.

C. Whenever a child is taken into custody as a deprived child, the parents or guardian of the child are entitled to a hearing within forty-eight (48) hours of the child being taken into custody, and thereafter at such intervals as may be determined by the court, in order to show cause why such child has been taken into custody or whey custody should not be remanded to the parents.

D. No order of the court providing for the removal of an alleged or adjudicated deprived child from his home shall be entered unless the court finds that the

continuation of the child in this home is contrary to the welfare of the child. Said order shall include either:

1. a determination as to whether or not reasonable efforts have been made to prevent the need for the removal of the child from his home and, as appropriate, reasonable efforts have been made to provide for the return of the child to his home; or

2. a determination as to whether or not an absence of efforts to prevent the removal of the child from his home is reasonable under the circumstances, if such removal of the child from his home is due to an alleged emergency and is for the purpose of providing for the safety of the child.

§1107. Detention or release of child-Medical examination and treatment

A. Whenever a child is taken into custody as a delinquent child or a child in need or supervision, he shall be detained or be released to the custody of his parent, guardian, attorney or custodian, upon the written promise of such parent, guardian, attorney or custodian to bring the child to the court at the time fixed. If detained, such child shall be taken immediately before a judge of the district court in the county in which the child is sought to be detained, or to the place of detention or shelter designated by the court. If no judge be available locally, the person having the child in custody shall immediately report his detention of the child to the presiding judge of the judicial administrative district. If the latter judge cannot be reached, such detention shall be reported immediately to any judge regularly serving

within the judicial administrative district. If detained, a reasonable bond for release shall be set. Pending further disposition of the case, a child whose custody has been assumed by the court may be released to the custody of a parent or other person appointed by the court, or be detained pursuant to the provisions of Section 18 of this act[1] in such place as shall be designated by the court, subject to further order.

B. Whenever a child is taken into custody as a deprived child, he shall be taken to a shelter, hospital, foster home or other appropriate place as designated by the court, or he shall be taken immediately before a judge of the district court for the

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[1]Section 1107.1 of this title.

purpose of obtaining an order for protective custody.

C. Nothing in Chapter 51 of this title[2] shall be construed as forbidding any peace officer or any employee of the court from immediately taking into custody any child who is found violating any law or ordinance, or whose surroundings are such as to endanger his welfare, or who is willfully and voluntarily absent from his home without the consent of his parent or guardian or legal custodian for a substantial length of time or without intent to return. In every such case the officer or employee taking the child into custody shall immediately report the fact of his detention to a judge of the district court in the county in which the child was taken into custody. If no judge

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[2]Section 1101 et seq. of this title.

is available locally, then the detention shall be reported immediately to the presiding judge of the judicial administrative district; but if the latter cannot be reached, then to any judge regularly serving within the judicial administrative district, and the case shall then be proceeded with a provided in Chapter 51 of this title, provided that the child shall not be detained in custody beyond the next judicial day unless the court shall so order after a detention hearing to determine if there exists probable cause to detain the child, as provided in Section 18 of this act.

D. When any child is taken into custody pursuant to this title and it reasonably appears to the peace officer or employee of the court that the child is in need of medical treatment to preserve his

health, any peace officer or any employee of the court shall have the authority to authorize medical examination and medical treatment for any child found to be in need of medical treatment as diagnosed by a competent medical authority in the absence of a parent or guardian who is competent to authorize medical treatment. The officer or the employee of the court shall authorize said medical treatment only after exercising due diligence to locate the parent, guardian or other person legally competent to authorize said medical treatment. The parent, guardian or custodian of the child shall be responsible for such medical expenses as ordered by the court. No peace officer or any employee of the court authorizing such treatment in accordance with the provisions of this section for any child found in need of such medical

treatment shall have any liability, civil or criminal, for giving such authorization.

Supreme Court, U.S.
FILED
APR 1 1991
OFFICE OF THE CLERK

No. 90-1353

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

MICHAEL SWEPSTON, PAM PADLEY, BARBARA SIECK, and BENITA LEVINGSTON,

Petitioners,

vs.

CLARK DAVENPORT SNELL, SHARON RUTH SNELL, JIM R. SNELL, BETH SNELL, JASON SNELL, BRITTANY SNELL, PATRICIA JEAN TURTLE, and JESSE SANDERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED 1

SUMMARY OF ARGUMENT 13

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

A. THE OPINION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IS CONSISTENT WITH THE RULINGS OF THIS COURT ON THE ISSUE OF ABSOLUTE IMMUNITY 15

B. BECAUSE PETITIONERS DID NOT ACT ACCORDING TO OKLAHOMA LAW, THIS CASE IS NOT AN APPROPRIATE ONE ON WHICH TO BASE A RULING BY THIS COURT ON ABSOLUTE IMMUNITY FOR SOCIAL WORKERS 18

C. THE CONFLICT IN THE DECISIONS OF THE CIRCUIT COURTS IS DUE IN SUBSTANTIAL PART TO DIFFERING STATE STATUTES REGARDING CHILD PROTECTIVE PROCEDURES 21

CONCLUSION 27

TABLE OF AUTHORITIES

Austin v. Borel,
830 F.2d 1356 (5th Cir. 1987) 25

Bradley v. Fisher,
13 Wall. 335 (1872) 16

Brisco v. LaHue,
460 U.S. 325 (1983) 16

Butz v. Economou,
438 U.S. 478 (1978) 18

Coverdell v. Department of Social
& Health Service,
834 F.2d 758 (9th Cir. 1987) 22, 23

Forrester v. White,
484 U.S. 219 (1988) 18

Imbler v. Pachtman,
424 U.S. 409, (1976) 15

Myers v. Contra Costa County
Department of Social Service,
812 F.2d 1154, (9th Cir. 1987),
cert. denied, 484 U.S. 829 ..... 21, 22

Snell v. Tunnell,
920 F.2d 673 (10th Cir. 1990) ..... passim

Stump v. Sparkman,
435 U.S. 349 (1978) 16, 17

Vosburg v. Department of
Social Services,
884 F.2d 133 (4th Cir. 1989) 24

STATUTES

10 Okla. Stat. §§408-09 19

10 Okla. Stat. §§1101(10),
1103(A)(B)(C) 18

21 Okla. Stat. §846 24

STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Respondents' complaints against petitioners arose the evening of August 26, 1987 when three social workers from the Oklahoma Department of Human Services ("DHS"), including petitioners Barbara Sieck and Benita Levingston, accompanied by three uniformed officers of the Oklahoma City Police Department entered respondents' home without notice, rounded up the children living there, questioned Sharon Snell and searched the respondents' papers. Even though the police sergeant observed that, "the house was generally clean and neat" and he "saw no obvious indications of abuse or neglect," seven children were removed from the home for whom respondents Clark and Sharon Snell did not have custody papers signed by a judge. Snell et al. v. Tunnell et al., 920 F.2d 673, 684-85 (10th Cir. 1990) (Appendix 1 at 49-54).[1] Petitioners acted pursuant to an Ex Parte Order issued by Sidney Brown, Presiding Juvenile Judge of the District Court of Oklahoma County on the basis of the

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[1]Citation is to Appendix to the Petition for Writ of Certiorari.

Application prepared by petitioner Pam Padley, attorney for DHS, which included the false statements that DHS had received allegations of child prostitution and child pornography in the Snells' home and that "DHS has been unable to complete the child abuse investigation due to lack of cooperation by the Snells." Petitioners did not bring the Application with them when they entered respondents' home, nor did they inform respondents of these allegations. Snell, 920 F.2d at 685 (Appendix 1 at 54-55).

Padley testified that she had never prepared or filed such an application before and knew of no DHS precedent for such an application. Snell, 920 F.2d at 695 (Appendix 1 at 104). The Oklahoma Statutes and rules and regulations of DHS provide that a preliminary inquiry shall be conducted before a child is taken into custody, and that the district attorney is responsible for filing a petition based on the information discovered in the preliminary inquiry, if further action is necessary. In the enforcement of matters related to licensing of child care facilities, the Oklahoma Statutes

provide that action is to be taken by the district attorney or the attorney general. Snell, 920 F.2d at 689-90 (Appendix 1 at 73-77).

Respondents Sharon Snell, who is a registered nurse, and Clark Snell have been volunteers for the Jesus House, a shelter for the homeless in Oklahoma City, since 1982. Over the years, they provided a temporary home and summer camp experience for many children. In August 1987, the Snell household included the Snells' three adopted children, eight children for whom the Snells were legal guardians and seven children who were being cared for by the Snells at the request and with the written consent of their mothers, who were either incarcerated or living at the Jesus House.

Relations between the Snells and certain DHS employees had become strained over the years. DHS allegedly received complaints that the Snells had refused to return children to their parents and the Snells had complained that certain DHS child welfare workers had failed to adequately protect children. In April of 1987, two employees of the Licensing Division of DHS visited respondents' home and found that the Snells were not in violation of the Oklahoma Child

Care Facilities Licensing Act. Snell, 920 F.2d at 677-78 (Appendix 1 at 14-16).

In July 1987, a DHS Child Welfare Division social worker visited respondents in their home, and also talked with their neighbors, in connection with his investigation of an anonymous complaint of neglect and inadequate supervision of children in the Snell home. The Snells advised the worker that at that time there were 15 children residing in the home who were either their adopted children, children for whom they had been appointed legal guardians, or children whose mothers requested that the Snells care for them. They declined to respond to the worker's request for the names of all the children. The following is an excerpt from the worker's report:

> The interior of the home was remarkably clean and organized with this many children about the house. The worker counted 11 children in the house. The children were clean; appeared to be in good physical health and appropriately clothed. There was evidence of daily housekeeping activity. The older children were assigned age appropriate chores to be done on a daily basis. The children gave the appearance of being well fed and happy to be a part of this household.

Snell, 920 F.2d at 678 (Appendix 1 at 17).

The report, which was dated July 23, 1987 and signed by petitioner Michael Swepston, supervisor, was submitted to the Juvenile Division of the District Attorney's office. It recommended that additional investigation concerning possible criminal prosecution of "non-accidental physical and mental injury, sexual abuse or neglect appears indicated." The Court of Appeals for the Tenth Circuit found this recommendation "paradoxical given the fact the report makes no mention of such allegations." The district attorney took no action on the report because of lack of evidence to support the recommendation. In her deposition testimony, the District Attorney stated that the report provided plaintiffs in discovery differs from the original and omits allegations of child abuse, child pornography and child prostitution. Snell, 920 F.2d at 678; 681; 682-83 (Appendix 1 at 20, 31-32; 39-40).

Clark Snell complained to DHS that when the worker talked with neighbors, he made derogatory remarks about the Snells. A meeting was held on July 20, 1987 at DHS at which time Clark Snell met with petitioner Padley and other DHS supervisory personnel to

discuss his complaints about DHS. Snell, 920 F.2d at 678-79 (Appendix 1 at 20-21).

In late July and early August, DHS received three reports regarding the Snells, one from a neighbor who complained the children were not adequately supervised when at play; one from an in-law of the Snells' son who complained that the house was dirty and the children were neglected; and one narrative report from the DHS Children's Shelter that a retarded eleven-year-old boy, G.H., who had stayed temporarily at the Snells because his mother could not cope with him, said that Clark Snell had struck and kicked him and told him he could either go to jail, stay with the Snells, or be killed. G.H. had a well documented history with DHS of emotional disturbance prior to his stay in the Snell home. Prior to August 26th, the Snells told the DHS social worker who came to their home to interview them about G.H. that G.H.'s problems were beyond what the Snells could handle given their responsibilities to the other children in the home. Snell, 920 F.2d at 679 (Appendix 1 at 24).

Mary Asbury, District Supervisor, gave the three reports to petitioner Sieck who gave them to petitioner Levingston for investigation. The reports were not given priorities for investigation as required by DHS regulations. Investigation was postponed pending a meeting of DHS supervisory personnel and petitioner Padley regarding the Snells. No written records of the investigation were made, contrary to DHS policy. Snell, 920 F.2d at 679; 682 (Appendix 1 at 25; 39).

The meeting regarding the Snells took place on August 12th. Afterwards, Asbury told petitioner Levingston to contact the local police department regarding Clark Snell. At Levingston's request, Police Detective Einhorn met with petitioner Swepston and Mary Asbury at DHS on August 14th. Einhorn testified that among the concerns expressed in the meeting was the allegation that a large number of children and adults were entering and leaving the Snells' house at all hours.

> The lower court viewed this meeting as "the genesis of the pornography and prostitution suspicions." Snell, 698 F. Supp. at 1550.

Snell, 920 F.2d at 680 (Appendix 1 at 27-28).

Einhorn asked FBI agent Leslie Treece to contact petitioner Levingston regarding "complaints regarding possible child pornography or prostitution, or something unusual going on at the Snells' house." Agent Treece testified that the first time she heard allegations concerning child pornography or prostitution in relation to the Snells was when she met with petitioner Levingston at DHS. Snell, 920 F.2d at 679-80 (Appendix 1 at 24-30).

In the summer of 1987, the FBI in Oklahoma City had received a request from another FBI district to contact Clark Snell because he had made a report to the FBI that a person who stayed temporarily at the Jesus House was suspected of using his children for prostitution. The FBI had taken action against the suspect, and the agent in Oklahoma City was requested to ask the person who made the report some questions about the suspect. FBI agent Leslie Treece interviewed Clark Snell for that purpose. There was never any allegation that the Snells were involved in such activity, and DHS was

well aware that the Snells were never the subject of the FBI investigation. Snell, 920 F.2d. at 680 (Appendix 1 at 29).

Although no new reports about the Snells had been received, by August 19th petitioners were directing their efforts toward getting a pick-up order for the children in the Snell home. Toward that end, the Oklahoma guardianship statute was discussed at a meeting at DHS attended by Asbury, Swepston, Sieck and Levingston. Levingston took a copy of the statute to the local police station, but the police refused to pick up the children based on the guardianship statute. Asbury called one of the juvenile judges seeking an order, but he advised her that he would have to speak to a worker in person before taking any action. Snell, 920 F.2d at 682 (Appendix 1 at 36-39).

The evening of August 19th, petitioners Levingston and Sieck went to respondents' neighborhood and observed their house from the house of their next-door neighbors. From there, Sieck and Levingston called Judge Brown regarding issuance of a pick-up order based on the guardianship statute. The judge told them that if they believed there was an emergency, he would contact the police regarding a pick-

up order. After calling petitioner Padley, who told petitioners that she did not believe the children could be picked up on the basis of the guardianship statute, Levingston and Sieck went home without taking any further actions. Id.

The following day, Sieck took the guardianship statute to one of the assistant district attorneys requesting a pick-up order. In response to this request, the team leader of the Juvenile Division, Rebecca McNeese, wrote a memorandum to the DHS court liaison expressing displeasure at the DHS attempt to "shop" for a district attorney who would issue a pick-up order given the lack of written evidence. Snell, 920 F.2d at 682-83 (Appendix 1 at 40).

Around August 24th Asbury provided Levingston with a copy of the Oklahoma Child Care Facilities Licensing Statute which includes the words "upon conviction". Levingston took the statute to the district attorney's office for an interpretation of its application to the Snells, but was advised by the DHS liaison of the memorandum from McNeese regarding the Snell matter. With the permission of Swepston and Sieck, Levingston discussed the statute with Judge

Brown. She then asked Detective Einhorn to talk with Judge Brown to confirm her understanding that the language "upon conviction" in the licensing statute meant that the Snells could be arrested. Snell, 920 F.2d at 683 (Appendix 1 at 41).

Einhorn talked with Judge Brown on the telephone about the Snell case on August 26th. He later went to the judge's office, but the judge was on the bench. Einhorn stated that he was told Judge Brown wanted an application from DHS before issuing an order. In a telephone conversation with Padley, Judge Brown asked her to coordinate the factual information in the case and prepare an application. Padley had two conversations with Detective Einhorn on August 26th. She also talked with Swepston, Sieck and Levingston and with Judy Collins of the licensing division regarding "getting an order to force the Snells to cooperate as it relates to licensing and looking at papers and things like that." Collins advised her that if licensing was the only issue, another visit to the home to request information was appropriate, rather than a court order. Snell, 920 F.2d at 684 (Appendix 1 at 46-47). Padley prepared the subject

application describing alleged reports about the Snells and asking the help of the court in completing child abuse and licensing investigations. She took the application to Judge Brown's office. Based primarily on the allegations of child prostitution, child pornography and denial of access, he prepared the Ex Parte Order. Padley delivered the Application and Ex Parte Order to the DHS Child Welfare Division where they were reviewed by petitioners prior to the entry into respondents' home which is the subject of this action. Snell, 920 F.2d at 677; 684 (Appendix 1 at 12; 48).

At the hearing which commenced the day after the children were removed from the Snell home, petitioners could present no evidence to support the allegations of child prostitution or child pornography. Detective Einhorn testified that the only allegations of nefarious sexual activity in the Snell home that he had received came from petitioners Sieck and Swepston and Mary Asbury. Snell, 920 F.2d at 686 (Appendix 1 at 56).

In affirming the decision of the district court denying absolute immunity to petitioners, the Tenth Circuit Court of Appeals cited with approval the opinion of the district court which states:

> While the tasks of social workers who investigate child protection matters are clearly matters of compelling interest and importance to the public, how can it be said that when these investigators allegedly violate a citizen's constitutional rights they are entitled to absolute immunity, when highly trained FBI, DEA and Treasury agents facing identical allegations are entitled to only qualified immunity?

Snell, 920 F.2d at 691 (Appendix 1 at 82).

SUMMARY OF ARGUMENT

The opinion of the Court of Appeals for the Tenth Circuit is consistent with the decisions of this Court granting absolute immunity to public officials based on the functions performed by those officials. In this case, neither the social workers nor the assistant general counsel of the Oklahoma Department of Human Services followed the Oklahoma Statutes or the regulations of the Department of Human Services in regard to child protective services and the licensing of child care facilities. Petitioners were performing investigatory functions similar to the duties of police officers. They were not taking actions

which were an integral part of the adjudicatory process and therefore are not entitled to absolute immunity. In filing the application with the juvenile court requesting assistance in completing child abuse and licensing investigations, the assistant general counsel of the Department of Human Services acted without precedent or statutory authority and is not entitled to absolute immunity.

Petitioners cite opinions of the Courts of Appeals for the Ninth and Fourth Circuits which grant absolute immunity to social workers. The decisions in those cases reflect that the social workers involved took action which initiated the adjudicatory process. Those actions were consistent with their duties as child protective workers under the statutes of the states involved. In the instant case, the Oklahoma Statutes provide that employees of the Oklahoma Department of Human Services shall investigate allegations of child abuse and neglect and report their findings to the district attorney. The district attorney is authorized to take action to initiate the adjudicatory process, not the employees of the Oklahoma Department of Human Services. The apparent conflict between the decision of

the Tenth Circuit in this case and the decisions of the Ninth and Fourth Circuits is based in substantial part on the differences in the statutory duties of the child protective workers involved. This is not an appropriate case for review by the Supreme Court of the United States.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

A.

THE OPINION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IS CONSISTENT WITH THE RULINGS OF THIS COURT ON THE ISSUE OF ABSOLUTE IMMUNITY

The statement in the Petition for Writ of Certiorari at p. 30 that the Tenth Circuit's reliance on allegations of fraud in denying absolute immunity conflicts with decisions of this Court is not correct. This Court has held that claims of absolute immunity from suit are not defeated by the presentation of false evidence by a prosecutor, Imbler v. Pachtman, 424 U.S. 409 (1976); or by false testimony on the

part of a witness, Briscoe v. LaHue, 460 U.S. 325 (1983); or by acts of a judge done maliciously or corruptly, Bradley v. Fisher, 13 Wall. 335, 351 (1872); Stump v. Sparkman, 435 U.S. 349 (1978), but the reason for providing absolute immunity in such cases is to protect the smooth functioning of the judicial process. The Tenth Circuit opinion denied absolute immunity to the non-attorney petitioners in this case not because of allegations of fraud, but because petitioners' acts were not an integral part of the judicial process. Instead, petitioners' actions were of an investigative nature similar to actions of police officers. While petitioners are correct that the court stated, "the summary judgment evidence indicates that these defendants assisted or acquiesced in the use of information known to be false concerning the Snells," the remainder of the sentence, "in order to further the licensing investigation" is the substance of the matter which is crucial to the ruling on absolute immunity. In addition to finding that the petitioners' actions were investigatory, the court found that petitioners were not acting as functionaries of the court;

> . . .[T]he application which resulted in the pick-up order was pre-adjudicatory and sought information

> which would be developed in other pre-adjudicatory procedures such as court intake or a preliminary inquiry that occur prior to the filing of a petition.

Snell, 920 F.2d at 690 (Appendix 1 at 78).

As to petitioner Padley, an assistant general counsel for DHS, the Tenth Circuit found that the summary judgment evidence did not show that she originated or augmented the false information. The court denied her claim of absolute immunity because she acted without any authority in preparing and submitting the application which included the false information. See Stump v. Sparkman, 435 U.S. 349 (1978). Padley took an unprecedented action to override the decision of the district attorney's office not to act. Snell 920 F.2d at 696 (Appendix 1 at 104). The exercise of discretion by a prosecutor in filing or not filing an action is protected by absolute immunity. Imbler v. Pachtman, supra. That Padley's unprecedented action to counter and supersede the discretionary decision of the prosecutor was determined by the Tenth Circuit not to warrant absolute immunity is not in conflict with the decisions of this Court.

B.

BECAUSE PETITIONERS DID NOT ACT ACCORDING TO OKLAHOMA LAW, THIS CASE IS NOT AN APPROPRIATE ONE ON WHICH TO BASE A RULING BY THIS COURT ON ABSOLUTE IMMUNITY FOR SOCIAL WORKERS

Consistent with the ruling of this Court in Butz v. Economou, 438 U.S. 478 (1978) and Forrester v. White, 484 U.S. 219 (1988), the Tenth Circuit used the functional approach in deciding the immunity issue. Under Oklahoma law and the procedures of the Oklahoma Department of Human Services, the district attorney and not a child welfare worker is responsible for initiating and prosecuting actions to protect children; the district attorney or the attorney general is responsible for prosecuting actions under the Child Care Facilities Licensing Act. DHS social workers, on the other hand, have responsibility for investigating allegations of child abuse and neglect and for licensing child care facilities. However, petitioners did not follow the relevant provisions of the Oklahoma statutes or the procedures of DHS in carrying out their duties in the instant case. The Oklahoma Statutes at 10 Okla. Stat. §§1101(10), 1103(A)(B)(C) require that a preliminary inquiry be conducted before a child is taken

into custody, and if further action is necessary, a petition may be filed by the district attorney or other authorized person. In this case, the district attorney found there was no evidence to support further action, but petitioners proceeded to take action nevertheless. Snell 920 F.2d at 689 (Appendix 1 at 75).

The DHS Child Welfare Services-Child Abuse/Preventive Services Procedures §§622.4, 623.6(D), 623.7(A) provide procedures for investigating reports of abuse and neglect, recording information and immediately informing caretakers of allegations. These procedures were not followed in this case. Snell, 920 F.2d at 679, 682 and 685-86 (Appendix 1 at 25, 39, 55).

The Oklahoma Statutes at 10 Okla. Stat. §§408-09 provide that the enforcement of violations of the Child Care Facilities Licensing Act shall be carried out by the Attorney General of Oklahoma or by a district attorney. In addition, petitioner Padley was told by the DHS employee of the licensing division that a further field visit to respondents' home, and not a court order, would be appropriate to investigate a licensing issue. However, petitioners

chose to seek a court order nonetheless. Snell, 920 F.2d at 684, 689 (Appendix 1 at 46, 73-74). Because petitioners did not follow the Oklahoma statutory and administrative procedures, this case is atypical and not an appropriate one upon which to focus when considering conflicting decisions of circuit courts on the issue of absolute immunity for social workers.

The statement in the Petition for Writ of Certiorari at p. 28 that the Tenth Circuit, "acknowledged that applicable Oklahoma Statutes did not prescribe any procedure for seeking or securing pre-adjudicatory orders from the juvenile court . . ." is an overstatement. What the Tenth Circuit said was that based on review of the statutory scheme, "we are inclined to agree that the procedure for obtaining a pick-up order was not entirely clear." Petitioners omitted the language that follows which is dispositive:

> However, at the time of the events in question, it is uncontroverted that normal procedure resulted in this function being handled by the police or the district attorney, not DHS.

Snell, 920 F.2d at 695 (Appendix 1 at 102-03).

The Court held that in this case, DHS clearly lacked authority to apply directly to the court for emergency investigative assistance or custody. Snell, 920 F.2d at 695 (Appendix 1 at 104). The facts of this case do not present a fair or accurate description of child protective services conducted according to the statutory and administrative procedures of the State of Oklahoma. For that reason, this case is not an appropriate one for the Court to review to determine whether social workers participating in child protective proceedings are entitled to absolute immunity.

C.

THE CONFLICT IN THE DECISIONS OF THE CIRCUIT COURTS IS DUE IN SUBSTANTIAL PART TO DIFFERING STATE STATUTES REGARDING CHILD PROTECTIVE PROCEDURES

Finally, petitioners argue that the Tenth Circuit's treatment of social workers involved in seeking pre-petition orders from the juvenile court conflicts with the Ninth Circuit's decisions in Myers v. Contra Costa County Dep't. of Social Serv., 812 F.2d 1154 (9th Cir. 1987), cert. denied, 484 U.S. 829 (1987) and Coverdell v. Department

of Social and Health Serv., 834 F.2d 758 (9th Cir. 1987) and the decision of the Fourth Circuit in Vosburg v. Department of Social Services, 884 F.2d 113 (4th Cir. 1989). In Myers, the court found the social case work specialist, whose responsibility included the initiation and pursuit of dependency petitions in cases of suspected child abuse and neglect, was absolutely immune from suit for actions taken in connection with bringing a dependency proceeding. However, the worker was not entitled to absolute immunity for actions which preceded the institution of judicial proceedings, i.e. his order to the father of the children to stay away from home until the judicial hearing could take place.

In Coverdell, the Ninth Circuit relied on its holding in Myers and granted absolute immunity to a child protective services worker (McLaughlin) who prepared an affidavit stating the reasons she believed a new-born child would be in danger if she were to reside with her parents. Based on the worker's affidavit, the county court granted the motion filed by the prosecutor for an order directing that the child be taken into protective custody. In affirming the trial

court's finding that the social worker was entitled to absolute immunity, the Ninth Circuit found that McLaughlin was performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings consistent with her duties under the Washington Statutes which state that child protective workers have the duty to investigate possible child abuse or neglect, to report to a law enforcement agency and where necessary, to refer such report to the court. The court concluded:

> Because McLaughlin's actions in seeking and obtaining a court order were within the scope of her statutory authority as a quasi prosecutor, she is entitled to absolute immunity from civil liability for her quasi prosecutorial conduct.

Coverdell, 834 F.2d at 764.

The Oklahoma Statutes direct the county offices of DHS to investigate allegations of child abuse and neglect according to the priority guidelines DHS has established. If the county office finds evidence of abuse and neglect, the statute directs that the findings be forwarded to the district attorney's office in the county wherein the suspected injury occurred together with the DHS recommendation as

to disposition. 21 Okla. Stat. §846 (Appendix 3 at page 6). The scope of the statutory duties of social workers investigating child abuse in the State of Washington is broader than that provided by the statutes of the State of Oklahoma, since social workers in the State of Washington are authorized to make direct referrals to the court. As a result, the petitioners herein and the social workers in the cases of Myers and Coverdell are not similarly situated.

In Vosburg, supra, the mother of a child disobeyed court orders to cooperate with social workers and provide visitation for the child with her father. One of the social workers filed a petition for preliminary removal order and the child was taken into custody and placed in a foster home. In the mother's civil rights action, the trial court granted summary judgment in favor of the social workers, finding that they were functioning as prosecutors and entitled to absolute immunity. The Court of Appeals for the Fourth Circuit affirmed citing Myers, supra, and reasoning that under Virginia law, the filing of a removal petition is, in essence, the start of judicial proceedings against the parent or guardian of a minor child, and the

duties of the social worker at that point are those of an advocate in that process. Vosburg, 884 F.2d at 137. The court in Vosburg was careful to emphasize that the grant of absolute immunity applies only to activities of social workers that could be deemed prosecutorial and added that the decision should not be read as holding that social workers are immune from liability arising from their conduct in investigating the possibility that a removal petition should be filed. Vosburg, 884 F.2d at 138.

In Austin v. Borel, 830 F.2d 1356 (5th Cir. 1987), social workers filed an allegedly false verified complaint that resulted in a child being removed from the parent's custody. The court found that under Louisiana law, social workers are authorized to investigate allegations of child abuse and report their findings to the district attorney, and that they may also file a verified complaint indicating there are reasonable grounds to believe a child should be taken into custody. "Issuance of an instanter order upon the filing of a verified complaint initiates custody, but only filing the petition itself initiates the adjudication process." Austin, 830 F.2d at 1361. The court held

that the filing of a verified complaint was functionally comparable to a police officer seeking an arrest warrant and that under the functional approach to immunity, the social workers were not entitled to absolute immunity.

In the instant case, the Tenth Circuit found that the statutory scheme in Oklahoma is similar to that in Louisiana and that social workers seeking a pre-petition custody order function like police officers seeking an arrest warrant. Snell, 920 F.2d at 690 (Appendix 1 at 79). The differences in the circuit court rulings on absolute immunity for social workers are based in significant part on differences in the statutory duties of the social workers involved. This case does not involve disparate treatment for persons similarly situated.

CONCLUSION

The petition presents no issue warranting review by this Court. Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari.

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